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In the Supreme Court of the United States

GREG ABBOTT, ET AL, APPELLANTS,

v.

SHANNON PEREZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

SHANNON PEREZ, *et al.*, *Plaintiffs,* v. STATE OF TEXAS, *et al.*, *Defendants.*	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]

DEFENDANTS' NOTICE OF APPEAL

Defendants the State of Texas, Greg Abbott, in his official capacity as Governor, and Rolando B. Pablos, in his official capacity as Secretary of State, hereby provide notice of their appeal to the Supreme Court of the United States of this Court's Order on Plan H358 (Aug. 24, 2017), ECF No. 1540.

The appeal is pursuant to 28 U.S.C. § 1253, which authorizes direct appeals to the Supreme Court of the United States from a three-judge district court's interlocutory injunctive orders. The Court's August 24, 2017 Order contains an injunction preventing the State from using the existing House Plan H358. *See* ECF No. 1540.

Additionally, an interlocutory order that is not expressly labeled as injunctive but nonetheless has the "practical effect" of granting an injunction may be

appealed as an injunctive order. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981). This Order also satisfies *Carson's* "practical effect" test because it prevents the State from using the existing House Plan H358.

Date: August 28, 2017

Respectfully submitted.

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APPENDIX B

In the United States District Court for the Western District of Texas

SHANNON PEREZ, ET AL.	§	
	§	
v.	§	SA-11-CV-360
	§	
GREG ABBOTT, ET AL.	§	

ORDER ON PLAN H358

Before Circuit Judge SMITH, Chief District Judge GARCIA, and District Judge RODRIGUEZ

This Order addresses Plaintiffs' statutory and constitutional claims against Plan H358, enacted by the 83rd Texas Legislature in 2013.

The following Plaintiffs assert claims against Plan H358: The Texas Latino Redistricting Task Force[1]

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[1] The Texas Latino Redistricting Task Force "is an unincorporated association of individuals and organizations committed to securing fair redistricting plans for Texas" and includes Hispanics Organized for Political Education ("HOPE"), the Mexican American Bar Association of Texas ("MABA"), the National Organization for Mexican American Rights ("NOMAR"), Southwest Voter Registration Education Project, the William C. Velasquez Institute, and Southwest Workers' Union. Docket no. 891 ¶ 4. The Task Force individual Plaintiffs include Joe Cardenas III, Florinda Chavez, Cynthia Valadez, Emelda Menendez, Alejandro Ortiz, Rebecca Ortiz, Armando Cortez, Gregorio Benito Palomino, Cesar Eduardo Yevenes, Jose Olivares, Tomacita Olivares, Renato De Los

(limited to HD90), MALC,[2] the Perez Plaintiffs,[3] and the NAACP Plaintiffs.[4] At this stage of the litigation, Plaintiffs' remaining claims involve statutory claims under § 2 of the Voting Rights Act ("VRA") and constitutional claims under the Fourteenth Amendment to the United States Constitution.

Santos, Alex Jimenez, Gilberto Torres, Socorro Ramos, and Sergio Coronado. *Id.* ¶¶ 5-20.

[2] MALC is a non-profit Latino legislative caucus established to serve the members of the Texas House of Representatives and their staffs in matters of interest to the Mexican American community of Texas. Docket no. 897 ¶ 18. MALC-1 is a list of current MALC members.

[3] Shannon Perez, Gregory Tamez, Sergio Salinas, Carmen Rodriguez, Nancy Hall, Dorothy DeBose, Jessica Farrar, Wanda F. Roberts, Richard Nguyen Le, and TJ Carson. The Perez Plaintiffs have joined with MALC in this phase of the litigation.

[4] The NAACP Plaintiffs include the Texas State Conference of NAACP Branches, an association of local chapters of the NAACP, Howard Jefferson, and Rev. Bill Lawson. Individual Plaintiff Juanita Wallace passed away in 2016. According to the affidavit of Carmen Watkins, Regional Director for Region VI of the National NAACP, the Texas NAACP has well over 10,000 members and members who are registered to vote in almost every county. NAACP-1. She further attests that "the NAACP has at least one branch in each of the implicated counties," 884 members in Tarrant County, 320 members in Bell County, 1,232 members in Harris County, and 147 members in Fort Bend County. *Id.* She further states that she reviewed the official membership lists in each of those counties and determined that there are members who reside in CD9, CD18, CD30, CD33, and House districts 100, 109, 110, and 111 (Dallas County), 95 and 101 (Tarrant County), 54 and 55 (Bell County), and 26 and 27 (Fort Bend County). *Id.*

I. Background and Summary of Claims

Although the Governor called the special session to adopt the Court's interim map H309, some changes were made to the map in Dallas, Tarrant, Harris, and Webb Counties, and the Legislature incorporated those changes into Plan H358. At second reading, Chairman Darby outlined criteria that he would apply in evaluating any proposed amendment:

> that it does not create a harm or a risk to further litigation by violating the constitution's "one person, one vote" principle regarding population deviation; that it does not dilute nor dismantle a Section 2 protected district under the Voting Rights Act or violates the Texas Constitution regarding contiguous districts or the county line rule. If those measures can be satisfied, I want to see that it addresses a concern, for example, the splitting of a community of interest. And finally, I'd like to see an agreement amongst the members affected.

JX-17.3 at S1-2. After three amendments were adopted, Darby stated that they were "small tweaks to districts between members that unite communities of interest and don't have any implications with regard to Section 2 of the Voting Rights Act or the constitution." *Id.* at S5.

The Task Force Plaintiffs bring *Shaw*-type and intentional discrimination/vote dilution claims based on the changes made to HD90 in Tarrant County.

MALC and the NAACP Plaintiffs assert § 2 results claims based on the Legislature's continued failure to draw additional minority coalition opportunity districts in

Harris, Fort Bend, Dallas, and Bell Counties, as shown in their proposed demonstration Plans H391 (MALC) and H392 (NAACP). Defendants maintain their position that § 2 cannot require the creation of coalition districts, but that argument has already been rejected by this Court as inconsistent with binding Fifth Circuit authority. Defendants further contend that these districts are not required by § 2 because Plaintiffs have failed to prove the necessary cohesion among the minority groups included.

MALC also contends that the Legislature was required to draw additional Latino opportunity districts in Nueces County and Midland/Ector Counties. Defendants argue that these districts cannot be required by § 2 because their creation would violate Texas's County Line Rule. This Court has already held that § 2 of the VRA may require the State to break the County Line Rule if § 2 requires the district under the totality of circumstances.

Plaintiffs contend that the intentional discrimination found by this Court in Plan H283 remains in Plan H358, and that Plan H358 was operated or maintained as a device to further intentional vote dilution. This Court's analysis in the Order on Plan C235 concerning the intent of the 2013 Legislature applied to both Plan C235 and Plan H358. Thus, the Court finds that the 2013 Legislature purposefully maintained the intentional discrimination contained in Plan H283 where the district lines remain unchanged or substantially unchanged. The Court will discuss the implications of its prior intent findings in the analyses of the various areas affected.

Last, Plaintiffs assert that the Legislature again acted with intent to discriminate in adopting Plan H358 in 2013 by the Legislature's continued hostility toward minority

districts, pretextual use of the County Line Rule to avoid creating new Latino opportunity districts, and refusal to consider minority coalition opportunity districts, despite the minority population growth. While the Court agrees that the circumstantial evidence remains unchanged in terms of the Legislature's refusal to recognize minority growth due to its continued hostility toward minority districts as perceived Democrat districts, the Court finds that the intentional discrimination in 2013 was limited to the Legislature's intent to maintain and perpetuate (without remedy) any infirmities in the plan that already existed.[5]

II. Analysis by County

The Court thus turns to its analysis of the various claims in each of the specific challenged areas.

A. Harris County

With regard to Plan H283, Plaintiffs asserted a § 2 results claim and intentional discrimination/intentional vote dilution claims. They challenged mapdrawers' failure to draw a new Latino or coalition opportunity district, despite the minority population growth, while protecting slower-growing Anglo districts. They also challenged the elimination of HD149, which they contended was a multi-ethnic coalition minority opportunity district as part of

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[5] Judge Garcia and Judge Rodriguez adopt the prior fact findings and opinions and incorporate them into this Order because they are relevant to the 2013 plan claims. In this Order, Judge Smith agrees that the Court's orders on the 2011 plans are law of the case. The findings and conclusions in this order are therefore not inconsistent with what this district court panel has already decided.

the Legislature's decision to reduce the number of districts in Harris County from 25 to 24.

In fashioning the interim plan H309, this Court found that Plaintiffs had demonstrated a likelihood of success on the merits of the § 2 claim in eastern Harris County. Specifically, the Court found that Plaintiffs had presented numerous demonstration plans illustrating that an additional compact majority-HCVAP district could be drawn there, and made a preliminary finding that creation of a new Latino opportunity district was justified by the totality of circumstances. Docket no. 690 at 8-9. The Court's interim plan thus reconfigured HD144 in the manner requested by Plaintiffs to have a majority HCVAP. *Id.* The Court also maintained HD149, finding that the § 5 claims were not insubstantial. *Id.*

In its Order on Plan H283, the Court found that Plaintiffs failed to prove intentional racial discrimination with regard to the decision to reduce the number of districts to 24 or the elimination of HD149. Docket no. 1365 at 52-54. However, the Court found that the failure to draw an additional Latino opportunity district in Harris County violated § 2 and was intentionally racially discriminatory. The Court noted that: the member-driven process failed to consider § 2 compliance insofar as minority members were essentially shut out of the process; Hanna's recommendation to consider drawing an additional Latino opportunity district (as he was able to do) was ignored; and when faced with a map that failed to create any new Latino opportunity districts, mapdrawers decided to shuffle minority population within the minority districts to artificially (and without legal basis) inflate the SSVR and HCVAP of existing Latino ability district HD148 to claim VRA compliance, knowing that this was

already a performing Latino district and that no new opportunity district was being created.[6] Docket no. 1365 at 53-57.

During the 2013 legislative session, some changes were made to HD133, HD137, and HD149 and incorporated into Plan H358. These changes were the result of Amendment 3 (Plan H318) offered by Reps. Wu, Vo, and Murphy. On the House floor, Rep. Wu stated that the amendment was agreed to by the three affected members and "swaps out sections of our districts." JX-17.3 at S4. He stated, "One of the main things it does is it helps reintegrate part of a very large Vietnamese population that has very strong language and cultural issues that neither Representative Murphy nor I can really address and are better placed in Representative Vo's district so he can better represent them. This helps make this area more constitutionally sound . . . ." *Id.*; *see also* Tr1525-26. No party complains of these changes.

With regard to Plan H358, MALC[7] asserts § 2 results claims and intentional vote dilution claims based on the intentional failure to create additional coalition opportunity districts.[8] MALC's demonstration Plan H391

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[6] As discussed in the Opinion on Plan H283, mapdrawers not only used their unjustified increase in SSVR and HCVAP in HD148 to defend their failure to create any new Latino districts in Harris County, they also used it to try to "offset" the loss of existing opportunity district HD33 in bad faith (an attempt that the D.C. Court properly rejected).

[7] The NAACP Plaintiffs do not have a claim for a new minority district in Harris County, but assert that HD149 is protected under § 2 and must be protected in any remedial map. Docket no. 1529 at 61.

[8] It is not possible to draw an additional BCVAP or HCVAP-majority district in Harris County using 2011-2015 ACS data. Tr60 (Korbel).

creates two additional coalition districts—HD132 is a Black + Hispanic CVAP coalition district and HD135 is a Black + Hispanic + Asian coalition district. JX-107; Tr32; MALC-24. Defendants contend that Plaintiffs cannot satisfy *Gingles* because minority groups do not vote cohesively in Harris County, citing the lack of evidence of cohesion in primary elections.

As noted in the Order on Plan C235, the evidence is undisputed that African Americans and Latinos choose primarily to participate in the Democratic primaries in Harris County. The undisputed evidence further shows that Latinos and African Americans are strongly cohesive in support of Democrat candidates in general elections. *See* MALC-22 Table 7 (2014 and 2016 elections). Brischetto characterized African American and Latino cohesion as "extremely high" in general elections. MALC-19 ¶ 64. Dr. Chervenak also found high levels of cohesion between African Americans and Latinos in general elections, with each group cohesively supporting candidates of each race. NAACP-2 Table 5.

As discussed in the Order on Plan C235, however, the evidence indicates a lack of cohesion between African Americans and Latinos in the primaries. Dr. Engstrom's countywide analysis of statewide elections involving Latino and non-Latino candidates indicates lack of Democratic primary cohesion between African-American and Latino voters. African Americans and Latinos shared support for only two of six Latino candidates in Harris County between 2006 and 2010 (both groups also shared a lack of support for candidate Alvarado). Docket no. 307-1 at 16. However, in one case where both groups supported the Latino candidate (Yanez for Supreme Court Place 8), African-American support was only 52.7%

and in the other case (Uribe for Land Commissioner), Latino support was only 59%. *Id.* Table 6. For three Latino candidates, African-American support for the Latino candidate was lower than "others." Docket no. 307-1 at 17-18

Dr. Brischetto did not study any primary elections. Dr. Chervenak did examine the 2016 Democratic primary in HD149 in southwest Harris County, where Asian-American candidate Hubert Vo ran against an African American. He found that a majority of African-American (56.4%) and Latino (60.6%) voters supported Vo. NAACP-2 Table 5A. But Vo also received majority support from Asian (62%) and white (55.4%) voters, meaning that all racial groups supported Vo in the primary, though none at very high levels. *Id.* Further, while HD149 is located within Harris County and is somewhat near (though not adjacent to) proposed tri-ethnic coalition district HD135, it is unclear how voting patterns in HD149 would translate to proposed HD135.

As discussed in the Court's prior orders, there was lay testimony about Hispanic and African-American coalitions in Harris County. And there was lay testimony, such as from Rogene Calvert, Sarah Winkler, Rep. Hubert Vo, and Rep. Sylvester Turner, that Asians, Latinos, and African Americans in Harris County had formed coalitions, though this testimony referred to southwest Houston, farther south than where proposed HD135 would be. Docket no. 1364 ¶¶ 410, 424-27, 451, 460, 503. Rep. Senfronia Thompson provided general testimony that African Americans, Latinos, and Asians work in cooperation together politically in Harris County.

But as it concluded with regard to the proposed congressional districts, the Court finds that there is

simply insufficient evidence of cohesion to show that, when combined, Black and Hispanic voters in proposed HD132 or Black, Hispanic, and Asian voters in proposed HD135 would cohesively support their candidates of choice. Thus, the § 2 results claims in Harris County fail.

To the extent MALC, Perez Plaintiffs, or the NAACP Plaintiffs contend that discrimination found by the Court in Plan H283 remains in Plan H358,[9] the Court rejects such a claim.

No further changes are required in Harris County.

B. Fort Bend County

The NAACP and MALC argued that the Fort Bend County configuration in Plan H283 violated § 2 because it resulted in minority vote dilution, and that an additional minority coalition district was required. Population growth (primarily minority) in Fort Bend County resulted in the addition of a new district there, but no additional minority district was drawn.

The Court considered the NAACP's proposed tri-ethnic coalition district HD26 in Plan H202, but found that the NAACP had failed to establish the *Gingles* preconditions. Specifically, the districts appeared compact, but Plaintiffs had not offered evidence that the minority communities contained within the district were

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[9] *E.g.*, docket no. 1454 at 41 (stating that it is "unclear whether all the intentional discrimination established by the NAACP and other parties has been adequately remedied"); docket no. 1529 (NAACP Post-Trial Brief) at 62 (the NAACP takes the position that "all the intentional discrimination in Harris County has not yet been remedied").

compact, taking into account traditional districting principles. Docket no. 1365 at 59.[10]

And even if the districts were compact, the Court found that the NAACP offered only lay testimony concerning minority cohesion in Fort Bend County, and the Court would not infer cohesion from other evidence in Harris County. *Id.* at 60. MALC's expert Dr. Brischetto provided the only expert testimony on racially polarized voting in Fort Bend County, and found cohesion among African Americans, Latinos, and Asians and polarized Anglo bloc voting. MALC-161 Table 22. But he only looked at elections in 2012, and he did not conduct a multivariate analysis of the primary elections. Docket no. 1364 ¶ 533.[11]

To support its § 2 results claims in Fort Bend County in this phase of the litigation, MALC offers demonstration Plan H391, which creates a new majority-minority Black+Hispanic+Asian district HD26. Tr30; MALC-24. Plan H391 redraws HD26, HD27, HD28, and HD85 in the "Fort Bend Mix" of Fort Bend, Jackson, and Wharton Counties, and is set up to be plugged into Plan H358.

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[10] The Court declined to consider MALC's Plans H329 and H366 because these plans were first introduced during the 2013 legislative session and were more properly considered as part of the 2013 plan case. Docket no. 1365 at 60.

[11] In his 2014 Supplemental Report, Dr. Alford noted that Dr. Brischetto found that in Fort Bend County, Asian voters supported Democrats in the general election at an average of only 60%. Alford 2014 Supp. Report at 17. Hispanic support was 72.2%, while Black support was 97.8%. MALC-161 Table 25. Dr. Alford further highlighted the lack of evidence of cohesion in the primaries, and predicted based on minority voter behavior in other areas that these groups would not be cohesive in the primaries. Alford 2014 Supp. Report at 21-22.

MALC-17 (Korbel 2017 Report) ¶ 26. MALC's expert George Korbel drew the plan, and he states that HD26, HD27, and HD28 are essentially located in suburban Houston areas, the districts are simplified, the split of the City of Richmond is eliminated, and the adjacent cities of Rosenberg and Richmond are combined in HD85. *Id.*

NAACP offers demonstration Plan H392, which creates tri-ethnic coalition district HD26, and Dr. Fairfax's testimony regarding compactness. County Commissioner Grady Prestage also testified to the compactness of proposed HD26. Tr567-68. The Court agrees that NAACP's proposed HD26 is compact and satisfies the first *Gingles* precondition of numerosity when all the groups are combined.

NAACP Plaintiffs offer the expert testimony of Dr. Chervenak to show racially polarized voting. NAACP-2 Table 4. He examined 2012, 2014, and 2016 general elections in HD26, finding in each case that African Americans, Latinos, and Asians were cohesive in support of the minority candidate, while non-Hispanic whites were strongly polarized against those candidates (with support never exceeding 13%). *Id.* Dr. Chervenak testified that there had not been a contested Democratic primary in HD26 for many years. Tr422. The NAACP Plaintiffs argue that this demonstrates that voters of color are not acting in opposition to each other, and each group supports the minority candidates in the general election. They further contend that lay witness testimony supports a finding of cohesion, citing Commissioner Prestage's testimony about K.P. George (Fort Bend ISD Trustee), Neeta Sane (HCC Board of Trustees), and Q Imam (Sugarland City Council). Tr557-58.

The State contends that Plaintiffs cannot satisfy *Gingles* because there is no evidence of cohesion among Asian-American, Black, and Hispanic voters in Fort Bend County. Docket no. 1526 at 63. They note that Plaintiffs' experts did not analyze primary elections, that Dr. Murray testified that Asian-American voters in Fort Bend County tended to split their vote almost evenly between Democrats and Republicans,[12] and that lay witness testimony failed to show cohesion within the Asian population. Defendants also cite the testimony of Jacey Jetton, who testified that Asian Americans are not cohesive among themselves, with South Asian voters and Chinese voters differing in preference, Tr699, and the testimony of Commissioner Grady Prestage, who also confirmed that the Asian-American community is not "monolithic." Tr581-82.

NAACP Plaintiffs argue that the Latino community is also not monolithic, but "that does not negate their ability to obtain fair representation under the Voting Rights Act." Docket no. 1529 at 56. However, the lay witness and expert witness evidence indicates that national origin subgroups within the Fort Bend Asian community[13] may have distinct political preferences such that they cannot all be considered together in determining cohesion. Jetton testified that the Asian community did not necessarily vote cohesively, citing instances where the South Asian and Chinese communities had differed. Tr699-701.

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[12] Tr1274-75 (Asians were between 45 and 55% Republican); Tr1288 (Asians in Fort Bend County are more Republican than nationally).

[13] Commissioner Prestage noted that the Asian population in Fort Bend County includes South Asian (Indians and Pakistanis), Chinese, and Vietnamese. Tr562.

Though Jetton's testimony was not particularly compelling for several reasons, Dr. Murray also stated that "you really need to look at national origin groups in Fort Bend County, because the South Asians are much more Democratic and have been since – a lot of them since 2001, too. So it's complicated communities, and to lump them all together is somewhat problematic in terms of analysis." Tr1290. He contrasted this with Latinos in Texas, which he said are mostly of Mexican origin, which "simplifies things a lot." *Id.*

Further, there is evidence that Latinos are not cohesive with other minorities in their choice of primaries. In his 2014 report, Dr. Brischetto found that more Latino voters in Fort Bend County chose to participate in the Republican primary (2.758) in 2012 than in the Democratic primary (576). MALC-161 Table 21. This was also true in 2010, where 2,176 Hispanics chose to participate in the Republican primary, while only 1,305 participated in the Democratic primary. Joint Expert Ex. E-3 (Lichtman Report) at 5 (Table 1). In 2008, however, 9,252 Hispanics chose the Democratic primary, while only 2,715 chose the Republican primary. *Id.*

Based on his general election analysis, Dr. Brischetto noted "severe" racial bloc voting between Anglos and African Americans, between Anglos and Hispanics, and between Anglos and Asians in Fort Bend County, and concluded that "[t]here is clearly a tri-ethnic coalition in support of Democrats in the general election" in Fort Bend County. MALC-161 ¶¶ 89, 91. However, he noted that "[v]oter cohesion among Asian American voters for Democrats in general elections is . . . considerably lower (60%) in Ft. Bend. In some of the contests, however, the Asian point estimates are not reliable." *Id.* ¶ 89. The mean

vote for Latinos was 72.2% and for African Americans it was 97.8%, compared to Anglo support of 5.9%. *Id.* at Table 25. Dr. Brischetto did not analyze any Fort Bend County elections in his 2017 report.

Considering all the evidence, the Court finds that Plaintiffs have failed to prove minority group cohesion sufficient for their § 2 results claims based on triethnic minority coalition districts in Fort Bend County.

The Court previously rejected the NAACP's intentional vote dilution claim concerning Fort Bend County for insufficient evidence. The NAACP continues to pursue its intentional vote dilution claim in Fort Bend County, arguing that the county is reportedly the most diverse in the country, and thus the minimization of minority voting strength, with only one of four districts having a representative of color, is circumstantial evidence of an intent to discriminate against voters of color. Docket no. 1529 at 52. In addition, the NAACP offers racial density shading maps to show that minority communities are cracked in the districts' configuration, with HD26 fragmenting a high-density Asian-American population in Sugarland and a substantial Asian-American population in the Four Corners and New Territory region. *Id.* The NAACP notes that County Commissioner Gary Prestage confirmed how Plan H358 fractures Asian-American communities, and the oddly shaped appendages reach out to grab predominantly white pockets of voters, in complete disregard for city boundaries and compactness.

The NAACP does offer circumstantial evidence of intentional vote dilution—minority communities are split, and the result is a lack of proportionality of representation (in 2010 Fort Bend County was 36.2%

Anglo, yet only one district has a representative of color). And the HD26 configuration is bizarre, but some explanations were given for the districts' shapes, and Plaintiffs have failed to prove discriminatory intent as opposed to discriminatory effects. Plaintiffs' shading exhibit shows an Asian community in Meadows Place is cracked, but there was evidence that Rep. Reynolds wanted population to the north, which could account for that cracking (the specifics of this possibility were not explored). In addition, mapdrawers offered race-neutral explanations for some of the bizarre shape of HD26. The Court maintains its finding that Plaintiffs have not shown intentional vote dilution in the Fort Bend County configuration.

No changes are required in Fort Bend County.

C. Bell County

In the prior phase of litigation, MALC, the Perez Plaintiffs, and the NAACP Plaintiffs asserted § 2 results and intentional vote dilution claims in Bell and Lampasas Counties. The Court found no § 2 results violation in Plan H283, noting that Plaintiffs' proposed districts combined three or four different minority groups but Plaintiffs lacked the necessary evidence of such multi-ethnic cohesion. Docket no. 1365 at 75. The Court also found that, considering all the evidence, the Legislature's intentional failure to create the proposed districts was not intentional vote dilution. *Id.*

However, the Court found evidence that mapdrawers (specifically Anglo Republican HD54 incumbent Aycock) intentionally racially gerrymandered the district by cracking minority population, thus diluting the minority vote to ensure Anglo control over both remaining

districts. Rather than respecting the boundaries of the City of Killeen, which included significant minority population and had been mostly within HD54 in the benchmark, he and mapdrawers split the City to divide its minority population. Plans were introduced by minority members that would have kept the City more whole, but they were rejected. Rep. Aycock, who drew the configuration, offered unconvincing and pretextual explanations for the split (such as that portions of the Killeen community were more of a community of interest with Lampasas than with the remainder of Killeen), leading the Court to find that the decision to split Killeen and the minority community within it (removing minorities from HD54 and moving in Anglos) was to ensure that HD54 and HD55 remained Anglo-majority and to make HD54 less likely to perform for minority voters.[14]

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[14] The Court also relied on evidence of racially polarized voting in Bell County. Anglos make up 55% of the adult population in Bell County, African Americans 21%, Latinos 19%, and Asians/Others 5%. MALC-161 ¶ 70. Dr. Brischetto conducted a multivariate analysis and found that, in each of the three federal elections, "there were clear patterns of severe polarization between Anglo voters, on the one hand[,] and Latino, African American voters, and Asian voters, on the other." *Id.* ¶ 73. On average, more than 9 in 10 Anglos preferred the Republican candidate while at least 8 in 10 Latinos and Asians and about 9 in 10 African Americans supported the Democrat. *Id.*

In the 2012 HD54 election, Anglos supported Anglo Republican Jimmie Don Aycock at 88.81%, while none of the minority groups supported him (19.13% Latino support, 6.77% African-American support, and 29.9% Other (Asians) support). *Id.* Table 19. All three minority groups supported African-American Democratic candidate Brown (80.87% Latino support, 93.23% African-American support, and 70.1% Other/Asian support). *Id.* In the race for Bell County Sheriff, Anglo support for the Anglo Republican candidate was

The Plan H283 configuration of Bell and Lampasas Counties remains unchanged in Plan H358. The NAACP Plaintiffs, MALC, and the Perez Plaintiffs continue to assert § 2 results and intentional vote dilution claims. *E.g.*, Docket no. 897 (MALC) ¶ 54 (Plan H358 "unnecessarily fragments the minority community of Killeen to minimize its political impact on Texas House elections"). They contend that the violations found by this Court concerning Plan H283 remain in Plan H358.

The NAACP Plaintiffs offer Plan H392, which draws HD54 as a 30.3% Black Alone CVAP and 20.9% HCVAP coalition district, and the expert testimony of Dr. Fairfax to show compactness. JX-108.3; Tr972 (Fairfax). MALC and Perez Plaintiffs offer Plan H391, which draws HD54 as a 30.1% Black Alone CVAP and 20.4% HCVAP coalition district. JX-107.3. Plan H391 reunites the City of Killeen in proposed minority opportunity district HD54, respecting municipal boundaries and creating a compact district, while also equalizing population variances this Court previously found to violate one person, one vote principles. Tr20 (Korbel). These districts satisfy *Gingles'* numerosity requirement as a coalition. Both are also compact, especially MALC's district in Plan H391.

However, Defendants contend that Plaintiffs cannot satisfy *Gingles* 2 because Plaintiffs did not establish that Black and Hispanic votes in Bell County are cohesive. Although Dr. Brischetto found racially polarized voting in Bell County in the 2012 general elections he analyzed,[15] he

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90.43%, while Latinos (85.81%), African Americans (97.35%), and Others/Asians (87.59%) voted for the Latino Democrat. *Id.* & ¶ 75.

[15] In his 2014 report, Dr. Brischetto found racially polarized voting in Bell County. MALC-161 Table 19. He found "[t]here is

did not analyze any Bell County elections from 2014 or 2016. Dr. Chervenak analyzed general elections in 2012, 2014, and 2016 and found racially polarized voting, but did not analyze primaries.[16] And Defendants contend that Plaintiffs' lay witness testimony does not provide a basis for finding cohesion.

The Court found that the lines in Bell County were drawn with a racially discriminatory purpose, and that the minority population was intentionally split to ensure

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clearly a tri-ethnic coalition in support of Democrats in the general election in the two counties where African American and Asian American voters were separated in the analyses [Bell and Fort Bend Counties]. Latino, Black and Asian voters are supporting Democrats, regardless of the race of the candidate." *Id.* ¶ 89. He also found "clearly cohesive bloc voting among Anglo voters, found to be very solid in Ft. Bend and Bell counties, where Black and Asian voters are separated in the analyses. On the average, 95% of the Anglos in those counties supported the Republican candidates in the general election." *Id.*

[16] Dr. Chervenak conducted a racially polarized voting analysis for six general elections within Bell County in 2012, 2014, and 2016. NAACP-2 Table 1. He found strong cohesion (93.4 to 97.6%) among African-Americans supporting African-American candidates in both district and statewide elections, and African-Americans also strongly supported Latino candidates in the general elections (93.6 to 98.9%). Similarly, he found cohesive Latino support for Latino candidates (82.9 to 89.9%) and for African-American candidates (82.9 to 88.6%). "Other" voter support for Latino or African-American candidates never came close to a majority (13.2 to 18.3%). In the 2012 HD54 general election, African Americans gave 95.1% support to African-American candidate Brown, Latinos gave 88.6% support, and other voters gave only 18.3% support. Thus, Dr. Chervenak found, the district (HD54) and statewide elections reveal a high level of racial polarization, with African Americans and Latinos cohesive in support of both African-American and Latino candidates, while minority preferences were not shared by other voters.

Anglo Republican voting strength in both districts in the area. That intent and harm remain in Plan H358 and must be remedied. Although Defendants argue that any intentional discrimination claim fails due to the lack of evidence that any legislator acted with a racially discriminatory purpose in voting for Plan H358 in 2013, the Court has found that the 2013 Legislature intended to continue the intentional discrimination found in Plan H283.

The Court need not decide whether Plaintiffs have proven that a coalition minority district is required under the § 2 results test. Defendants conceded during the interim map phase, with respect to DFW and CD33, that an appropriate remedy for cracking a minority population would be to reunite that population.[17] As noted, Killeen was mostly whole in Plan H100 but its minority population was then intentionally split to minimize minority voting strength. As a possible remedy, MALC's Plan H391 reunites the City of Killeen and its minority population.

Plaintiffs' intentional discrimination/vote dilution claims have merit, and a remedy is required in Bell County.

D. Dallas County

In Dallas County, the Court rejected the NAACP Plaintiffs' § 2 results claims with regard to Plan H283 because they failed to meet their burden under *Johnson v. De Grandy* to show that Plan H202 contained more compact opportunity districts than Plan H283, and found

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[17] Because the reunited population is not being purposefully drawn into a minority coalition district for § 2 purposes, evidence of cohesion in the primaries is unnecessary.

that the remaining § 2 results claims were best addressed in the 2013 plan case. Docket no. 1365 at 62 n.49. And while the Court did not find racial gerrymandering or intentional vote dilution in eastern Dallas County, it did find an improper use of race to dilute Latino voting strength in western Dallas County. Specifically, the Court found that mapdrawers improperly used race to make HD103 and HD104 more Hispanic and HD105 more Anglo to protect an Anglo Republican.

The Court's interim Plan H309 did not alter the Dallas County configuration from Plan H283. However, during the 2013 legislative session, some changes were made to HD103 and HD115 through an agreed amendment (Amendment 2, Plan H324) proposed by Rep. Anchia (HD103) and Rep. Ratliff (HD115). Anchia testified that the change was requested by Rep. Ratliff, and Anchia wanted to accommodate him to maintain good relationships. Tr131-133. The amendment swapped some population between the two districts. On the House floor, Rep. Villalba explained that Rep. Anchia would receive the entire community of Farmers Branch in exchange for keeping together the Carrollton Community in HD115. JX-17.3 at 4. Chairman Darby testified (as he also stated on the House floor) that the amendment also "helped the [population] deviations." Tr1525; JX-17.3 at 6 ("Anchia was way over the deviation, and Bennett Ratliff's district was way under. What that did—what this amendment did was help bring those deviations back into line."). No party complains about these changes.

The NAACP Plaintiffs, MALC, and the Perez Plaintiffs assert results and intentional vote dilution claims under § 2. Plaintiffs contend that certain violations found by this Court concerning Plan H283 remain in Plan

H358, specifically this Court's findings concerning HD103, HD104, and HD105 in western Dallas County. NAACP Plaintiffs continue to assert "that minority voters across the county, not just in the western part of the county, were intentionally cracked and packed" beyond those identified areas. Docket no. 1529 at 58.

For the § 2 results claim, MALC's Plan H391 proposes four new minority-majority CVAP coalition districts in Dallas County. Tr31; JX-107; MALC-24. HD102 and HD107 would be Black + Hispanic coalition districts, and HD105 and HD113 would be tri-ethnic coalition districts including Asians.

NAACP Plaintiffs assert that Plan H392 "presents a configuration that corrects [the] intentional discrimination [found by the Court in Plan H283], and when the districts are drawn fairly, three additional majority-minority districts naturally occur, reflecting the population present in those areas." Docket no. 1529 at 58. Those districts are HD105 in western Dallas County, and HD102 and HD107 in eastern Dallas County. All three districts are Black + Hispanic coalition districts, though HD105 and HD102 are Hispanic-plurality districts and HD107 is a black-plurality district. NAACP Plaintiffs contend that lay expert testimony demonstrates that the proposed districts are compact. They assert that these districts are required by § 2 and to remedy the intentional discrimination across Dallas County.

Whether § 2 requires these districts again boils down to whether minority voters in the proposed districts are politically cohesive. Plaintiffs assert that they have established racially polarized voting through expert and lay witness testimony. The evidence discussed in the Opinion on Plan C235 is equally relevant here. Dr.

Chervenak examined six elections in Dallas County. NAACP-2 Table 2. His multivariate analysis revealed racially polarized voting—African Americans and Latinos are cohesive in support of African-American and Latino candidates, while other voters did not share the candidate preferences of African-American and Latino voters. In the 2016 general election for HD107 in Dallas County, Dr. Chervenak found Latinos (83.8%) and African Americans (87.5%) were cohesive in their support of Neave, while Anglos gave only 41.1% support. *Id.*

Dr. Brischetto found racially polarized voting in the five general election contests in 2014 and 2016 that he analyzed—African Americans and Latinos voted cohesively in support of three Latino Democratic candidates and Anglos were cohesive in their lack of support; Anglos gave 64 and 69.4% support to the Latino Republican candidate, while African Americans and Latinos did not support those candidates. MALC-19 Table 5. Thus, "[i]n all five of these contests, African American and Latino voters were supporting the same candidates and opposing the candidates preferred by Anglo voters. The degree of cohesiveness in voting between African Americans and Latinos was extremely high in Dallas County." *Id.* ¶ 50. Plaintiffs also cite to the testimony of Rep. Eric Johnson from Dallas, who stated that African-American voters were strongly supportive of Latino House representatives currently serving in the areas encompassed in HDs 103, 104, and 105. Tr520-21.

Dr. Engstrom's analysis of general elections also found strong cohesion between African Americans and Latinos in support of the Democratic candidate, with Anglo voter support in the 20-30% range. Docket no. 307-1 Table 5. But Dr. Engstrom's analysis of primaries found

that African Americans were "the least likely group to support Latino candidates in Democratic primaries." *Id.* at 15 (African American support was lower than "Other" support in six of eight primaries); *see also id.* Table 5.

Defendants note that Korbel did not consider primary cohesion when he drew the districts and did not offer any opinion on cohesion, and that MALC's expert Dr. Brischetto did not look beyond general elections. They further note that NAACP expert Dr. Chervenak did not examine primary elections in Dallas County and could not make any statements about the characteristics of Latino, African American, or Asian American candidates of choice. Tr443-45. Further, Defendants assert, to the extent the record contains any evidence regarding cohesion, it shows that Black and Hispanic voters are not cohesive.

Considering all of the evidence, the Court finds, as it did in the Order on Plan C235, that Plaintiffs have failed to demonstrate the necessary cohesion for their § 2 results claims in Dallas County.

However, the Court finds that the intentional discrimination it found in western Dallas County in Plan H283 still exits in Plan H358. H309 made no changes to Dallas County. Although some changes were made in H358, these did not remove or remedy the intentional discrimination.

Accordingly, changes are necessary in Dallas County to remedy the intentional discrimination previously found by the Court in HD103, HD104, and HD105.

E. Nueces County

MALC challenges the configuration of districts in Nueces County under § 2 and the Fourteenth Amendment. As discussed in the Court's opinion on Plan H283, it is undisputed that Nueces County had two benchmark Latino opportunity districts (HD33 and HD34, though both failed to elect Latino-preferred candidates in 2010) and part of a third district (HD32) represented by Anglo Republican Todd Hunter. Because Nueces County grew at a slightly slower rate than the statewide average, all three districts were underpopulated compared to the 2010 county population ideal. The 2010 census population entitled Nueces County to almost exactly two (2.02) districts under the County Line Rule. During the 2011 redistricting process, mapdrawers chose to eliminate one of the Latino opportunity districts (HD33) and draw two districts wholly within Nueces County—one strongly Latino (HD34) and one a safe Anglo Republican seat (HD32) to protect incumbent Hunter.

Although the HCVAP of Nueces County was above 50%, mapdrawers did not look into whether two majority-HCVAP Latino opportunity districts could be maintained in Nueces County, either wholly within the County or by breaking the County Line Rule, despite advice from David Hanna of the Texas Legislative Council to consider those options. Instead, they relied on countywide SSVR (which was below 50%) to assert that it was mathematically impossible to draw two Hispanic districts wholly within the County, and they categorically refused to consider breaking the County Line Rule to comply with the VRA.

They then tried to offset the § 5 retrogression caused by the loss of HD33 by increasing the SSVR of two districts that were electing Democrats, HD90 and HD148, even though, as the D.C. Court held, these were already ability districts.[18] They did not consider whether § 2 required two Latino opportunity districts in Nueces County because, they believed, increasing the number of majority-SSVR (in Interiano's view) or majority-HCVAP (in Downton's view) districts statewide also precluded that claim. Thus, as this Court previously concluded, the motive for increasing the SSVR in HD90 and HD148 was not to increase Latino electoral opportunity in the spirit of the VRA, but to undermine Latino voting strength statewide by attempting to mask the loss of HD33 and preclude § 2 results claims.

Although Plaintiffs challenged the Nueces County configuration in Plan H283, this Court did not alter the districts in Plan H309. The Court lacked the benefit of the full record in making its preliminary determinations. Thus, at the time, the Court also focused on SSVR rather than HCVAP.[19] Further, the Court concluded that the loss of HD33 for § 5 purposes was offset by the new Latino

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[18] As noted below in the discussion of Tarrant County, the Task Force contends in this phase of the litigation that HD90 did need an increase in HCVAP/SSVR to allow Latinos to control the Democratic Primary. Even if that is true, that was not the basis for the Legislature's actions in increasing HD90's SSVR in 2011.

[19] A review of the full record indicated that HCVAP data was available to mapdrawers before the map went to the floor, that the HCVAP of Nueces County was comfortably above 50% in 2010, that it had been above 50% since the last census in 2000, and that mapdrawers were aware of these facts, yet continued to focus on SSVR because it was below 50%.

opportunity district HD144 in the interim map. The Court could not conclude, at that time, that plaintiffs were likely to succeed on their § 2 claim because it appeared that the only way to maintain two Latino districts in Nueces County was to cut a county line, which seemed inappropriate absent a § 5 violation (which existed in Plan H283 but not H309). But the Court did not rule out a conclusion that the VRA could require a county line cut:

> This is not to say that Section 2 of the VRA could never require a county line cut. This Court can envision a situation in which the refusal to cut a county line could, even in the absence of discriminatory purpose, result in vote dilution. However, in the particular circumstances of this case, traditional redistricting principles counsel in favor of maintaining two districts in Nueces County.

Docket no. 690 at 8.

During the 2014 trial, the Task Force Plaintiffs argued for the first time that two HCVAP-majority districts could be drawn wholly within Nueces County, but did not offer a demonstration map with such districts. The Court found that consideration of the § 2 results claim concerning Plan H283 was premature because, while mathematically two HCVAP-majority districts could be drawn in the area, no Plaintiff demonstrated whether or not two *Gingles*-compliant districts could have been drawn wholly within the County,[20] and it was improper to

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[20] No Plaintiff submitted a proposed map or other information to support the *Gingles* preconditions for such a map.

consider whether § 2 required a County Line Rule violation in Nueces County until that issue was decided.

However, this Court did find evidence of intentional vote dilution in the Legislature's refusal to consider whether the VRA required HD33 to be preserved and its attempted offset for the elimination of HD33 (described above) and also in the configuration of remaining HD32 and HD34. Docket no. 1365 at 37-40. The Court found that HD32 and HD34 were racially gerrymandered to dilute Latino voting strength and protect Anglo incumbent Hunter. HD34 was intentionally packed with Hispanic voters, Hunter intentionally drew out potential Hispanic rivals (both Republican and Democrat), and Hunter intentionally overpopulated HD34 and underpopulated HD32 without legitimate justification in violation of one-person, one-vote principles. The Nueces County configuration remains unchanged in Plan H358, and MALC asserts § 2 results and intentional vote dilution claims.

Standing

Although Defendants have not raised the issue, these claims require us to determine whether MALC has standing. MALC's standing argument in Nueces County centers on Raul Torres, a registered voter in current HD34 and a former Texas House representative and MALC member from HD33, the eliminated Nueces County Latino opportunity district. MALC argues that it has organizational standing "to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). In this respect, MALC argues that its organizational strength and membership

depend on growth, but that Plan H358 impedes this purpose by eliminating MALC member Torres and preventing potential MALC members from being elected. Docket no. 1462 at 5.

Separately from its argument on organizational standing, MALC asserts that it has associational standing, which requires that an individual MALC member have standing to sue in his or her own right. Docket no. 1462 at 2. To support this requirement, MALC points again to Torres, who "at the time of the filing of this action and the initial redistricting, had his district completely eliminated and was then paired with Anglo Republican Representative Connie Scott." *Id.* at 3.[21]

The general elements of standing are well established:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or

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[21] MALC briefly asserts a third independent argument for standing in Nueces County (and other areas): "MALC also relies on the standing of co-Plaintiffs LULAC and NAACP in the areas of [Nueces County and others], all of whom are seeking the same relief. *See e.g. Ruiz v. Estelle*, 161 F.3d 814 ([5th Cir.] 1998)." Docket no. 1462 at 5 n.1. MALC contends *Ruiz* supports the proposition that "intervenors and similarly situated litigants may not independently require standing if one co-litigant has standing and the intervenor or co-litigant is seeking the same relief." *Id.* Even assuming *Ruiz* can be read this broadly and extends beyond the intervenor context to cover "similarly situated litigants" more generally, this argument fails because neither LULAC nor the NAACP is similarly situated with MALC in Nueces County—MALC is the only plaintiff challenging the configuration of Nueces County in Plan H358.

> imminent, not 'conjectural' or 'hypothetical[.]'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted) (most alterations original).

There are two main types of standing for entities such as MALC. First, through organizational standing, "an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth*, 422 U.S. at 511. Organizational standing is to be distinguished from associational standing (more descriptively termed representational standing) through which "[a]n association has standing to bring suit *on behalf of its members* when [1] its members would have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 181 (2000) (emphasis added).

The Court agrees that MALC has organizational standing, and alternatively, that MALC has associational/representational standing.

organizational standing

The Supreme Court in *Warth*, by simply recognizing that an organization may seek judicial relief from an injury to the organization itself, articulated what is often cited as the origin of organizational standing. 422 U.S. at 511. Several years later, the Supreme Court refined this concept by deciding the seminal case on this topic, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). The relevant portion of *Havens* dealt with the standing of an organization—Housing Opportunities Made Equal ("HOME")—to bring racial steering claims against a realty company under the Fair Housing Act. *Id.* at 378-79. Relying partly on *Warth* to conduct "the same inquiry as in the case of an individual," the Supreme Court looked to the following allegations from HOME's complaint regarding its expenditures of resources to determine whether HOME alleged a sufficient injury:

> "Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices."

Id. at 379 (internal citations to HOME's Complaint omitted). The Supreme Court held that the district court improperly dismissed for lack of standing:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there

> can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests.

Id.

Beyond this main holding, the Supreme Court made two noteworthy comments. First, the Court contrasted its finding that these allegations exceeded a simple setback to HOME's abstract interests with prior case law holding that a mere interest in a problem could not support organizational standing. *Id.* at 379 (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)). Second, the Supreme Court noted that HOME was not deprived of standing simply because its injury was noneconomic. *Id.* at 379 n.20.

The Fifth Circuit has applied this concept of organizational standing on many occasions, helping define its boundaries by focusing on whether a plaintiff's alleged injury is sufficiently concrete and traceable to the defendant's conduct. In *Louisiana ACORN Fair Housing v. LeBlanc*, the Fifth Circuit recognized that an organization's redirection of "some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization." 211 F.3d 298, 305 (5th Cir. 2000). But outside of costs expended pursuing litigation, an organization will have organizational standing if it "prove[s] a drain on its resources resulting from counteracting the effects of the defendant's actions."

Id.; *ACORN v. Fowler*, 178 F.3d 350, 356-62 (5th Cir. 1999).

In *Fowler*, the court addressed the standing of a voter advocacy organization to force state compliance with the National Voter Registration Act ("NVRA"). 178 F.3d at 356-62. The court concluded that neither litigation costs nor expenditures made to monitor state compliance with the NVRA supported organizational standing because these injuries were not fairly traceable to the state. *Id.* at 358-59. But for some claims, the court found that the organization had standing based on its voter registration activities, the cost of which increased out of a need to "counteract[ ] the effects of [the state's] alleged failure to implement [the NVRA]." *Id.* at 360-61; *see also Scott v. Schedler*, 771 F.3d 831, 837 (5th Cir. 2014) (affirming a district court's finding of standing for the Louisiana NAACP because the head of its voter registration efforts personally conducted registration drives to counteract a state's alleged noncompliance with the NVRA, even though the NAACP itself may not have spent any money to conduct these drives).

Still, not all diversions of resources counteracting a defendant's conduct establish an injury in fact. *NAACP v. City of Kyle, Tex.*, 626 F.3d 233, 238-39 (5th Cir. 2010). In *City of Kyle*, the court concluded that organizations had not suffered an injury in fact arising from a city's new housing ordinances where they failed to explain how their activities, "which basically boil[ed] down to examining and communicating about developments in local zoning and subdivision ordinances, differ[ed] from [their] routine lobbying activities." *Id.* at 238. Further, the court considered the plaintiffs' failure to identify specific projects that were delayed or curtailed as a result of

resources being diverted to the challenged ordinances. *Id.* The court characterized the plaintiffs' alleged injuries as simple setbacks to the organizations' abstract interests rather than perceptible impairments to their abilities to carry out their purposes, despite the fact that the plaintiffs commissioned a $15,000 study on the impact of the challenged ordinance. *Id.* at 238-39.

The Fifth Circuit has also indicated that a conflict between the defendant's conduct and the organization's mission is necessary but not sufficient to establish organizational standing. *Fowler*, 178 F.3d at 361-62 ("[U]nless it [is] clear that an organization's stated goals [are] 'at loggerheads' with a defendant's conduct, 'it is entirely speculative whether the defendant's conduct is impeding the organization's activities.'" (quoting *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1429-30 (D.C. Cir. 1996)). This requirement was satisfied in *Fowler* where the voter advocacy organization's purpose of increasing the political power of low and moderate income people was at odds with the state's alleged failure to facilitate voter registration. *Id.*

This Court is aware of no redistricting case in which an organizational plaintiff has based its standing on an injury to itself, as described in *Havens*. Nor is this Court aware of any redistricting decisions rejecting such a theory. But while *Havens* and many other decisions on organizational standing deal with the Fair Housing Act, nothing in *Havens* limits organizational standing to such challenges. Indeed, as noted above, the Fifth Circuit and other courts have extended this concept of organizational standing beyond the housing context. *E.g.*, *Fowler*, 178 F.3d at 356-62 (the NVRA); *Schedler*, 771 F.3d at 836-37 (same); *Georgia State Conference of N.A.A.C.P. v. Kemp*,

841 F. Supp. 2d 1320, 1336-37 (N.D. Ga. 2012) (same). Most importantly for present purposes, despite not dealing specifically with redistricting claims of the type asserted in this case, courts have consistently found standing under *Havens* for organizations to challenge alleged violations of § 2 of the VRA and the Fourteenth Amendment.

A majority of the Supreme Court has accepted this approach in the § 2 context. In *Crawford v. Marion County Election Board*, the Seventh Circuit found that the Indiana Democratic Party had organizational standing to assert § 2 and Fourteenth Amendment claims against an Indiana voter ID law because it "injure[d] the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote. *See Havens*[, 455 U.S. at 378]." 472 F.3d 949, 951 (7th Cir. 2007). Subsequently, a splintered Supreme Court affirmed the Seventh Circuit's grant of summary judgment against the plaintiff's claims on the merits. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 188-89 (2008). In doing so, five justices across two opinions explicitly approved of the Seventh Circuit's standing analysis. *Id.* at 189 n.7 (Stevens, J., joined by Roberts, C.J., and Kennedy, J., announcing the judgment of the Court); *id.* at 209 n.2 (Souter, J., joined by Ginsburg, J., dissenting).

Other circuit and district courts have unanimously reached similar conclusions on organizational standing for § 2 and Fourteenth Amendment claims. *See, e.g., Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 2265 (2017) (finding organizational standing to bring § 2 and Fourteenth

Amendment claims against a state law restricting absentee ballots and in-person voting assistance because the organization planned to expend resources to counteract the law's effect on the African-American community). In one case, for example, the Democratic Party of Virginia alleged § 2 and Fourteenth Amendment claims against a Virginia voter ID law. *Lee v. Va. State Bd. of Elections*, 155 F. Supp. 3d 572, 575-76 (E.D. Va. 2015), *on reconsideration*, 3:15CV357-HEH, 2016 WL 6921611 (E.D. Va. Feb. 2, 2016). At the pleadings stage, the district court found that the Party sufficiently alleged its organizational standing based on expected expenditures of additional resources and longer lines at polling places. *Id.* at 579. The court added that the Party also "claim[ed] direct injury to its raison d'être—electing candidates who support the democratic platform, as opposed to the individualized interests of its members." *Id.* at 578.

Following a trial, the court found that the Party proved its standing and its injury, "primarily in the form of diversion of time, talent, and resources to educate their voters and implement the requirements of the Virginia voter identification law." *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577, 584 (E.D. Va. 2016). Without mentioning standing, the Fourth Circuit affirmed. 843 F.3d 592 (4th Cir. 2016).

The only case indicating a contrary result is *Lopez v. Merced County, California*, in which the court granted summary judgment for lack of organizational standing against the Mexican American Political Association's § 5 claims because the Association failed to proffer evidence "that [it] ha[d] suffered organizational harm, including any evidence that [it] actually diverted significant organizational resources in an effort to assure Hispanic

voter rights." 1:06-CV-1526OWWDLB, 2008 WL 170696, at *8 (E.D. Cal. Jan. 16, 2008). But *Lopez* was a summary judgment decision where the Association's claim to organizational standing foundered not because it was invalid as a matter of law but because the Association failed to meet its evidentiary burden. And as noted, other courts have unanimously recognized this application of organizational standing in the § 2 context.

Plan H358, like Plan H283, eliminates the district of former MALC member Raul Torres. At trial, MALC presented the testimony of Representative Rafael Anchia, the present chairman of MALC. Anchia testified that MALC has "dual purposes." Tr117. One purpose is to represent Latinos in Texas, and one is to grow MALC's membership. *Id.* Defendants presented no contrary evidence on MALC's purposes. On the basis of this evidence, MALC has organizational standing to challenge Plan H358's configuration of Nueces County, which perpetuates the elimination of HD33. MALC's injury due to this configuration is hardly speculative—MALC's loss of a member was caused directly by the elimination of Torres's district.

This is not a case where the Court must assess the expenditure of resources to counteract a certain enactment's effect to determine whether there is a sufficient injury; nor is this a case where MALC's nonmonetary efforts in counteracting the Plan are at issue. Instead, the injury here is as direct as can be—MALC's very existence, its raison d'être, depends on its membership and growing that membership, and Plan H358's treatment of Nueces County reduced that membership by eliminating Torres's district and deliberately placing Torres in a district he could not win.

See Lee, 155 F. Supp. 3d at 578. As a result, MALC has organizational standing to challenge Plan H358 in Nueces County.

associational/representational standing

The Court also finds alternatively that MALC has representational standing for its Nueces County claims. As mentioned, "[a]n association has standing to bring suit on behalf of its members when [1] its members would have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth*, 528 U.S. at 181. MALC easily satisfies the second and third prongs because the district lines are important to MALC's purposes of growing its membership and representing Latinos in Texas, and this litigation, like other similar redistricting cases, has proceeded without the participation of individual members. Accordingly, the only issue for associational standing is whether MALC has a member who would have standing to sue in his or her own right.

The only current MALC member in Nueces County is Abel Herrero, the representative for HD34 in Plan H358. MALC-1 at 3. Herrero is also a voter in HD34. As discussed above, Nueces County in Plan H358 includes two districts, HD32 and HD34. HD34, Herrero's district, is a Latino opportunity district. Thus, Herrero's standing (and therefore MALC's representational standing through Herrero) must exist even though Herrero lives in a Latino opportunity district in Plan H358.

"No circuit has developed a framework specifically for a Section 2 standing inquiry." *Pope v. Cty. of Albany*, No.

1:11-CV-0736 LEK/CFH, 2014 WL 316703, at *5 n.13 (N.D.N.Y. Jan. 28, 2014). As a result, this Court will look to the alleged injury and determine whether it is sufficiently concrete, causally connected to the Defendants' conduct, and redressable. *Lujan*, 504 U.S. at 560-61. *Pope*, in which a district court found that minority plaintiffs residing in existing majority-minority districts had standing to bring vote dilution claims based on the possibility of drawing an additional majority-minority district, is the most analogous authority in conducting this analysis. 2014 WL 316703. at **5-6.

"Nothing in [§ 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). This concept of proportional representation, which refers to "the success of minority candidates, as distinct from the political or electoral power of minority voters" is expressly *not* the right guaranteed by § 2. *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994). Therefore, lack of proportional representation alone cannot be the alleged injury in a § 2 vote dilution plaintiff's claim to standing. *See Pope*, 2014 WL 316703 at *5.

The Court in *Pope* contrasted "proportional representation" as that term was used by the Court in *De Grandy* with "substantial proportionality of political opportunity," which it defined as "per capita voting power on par with the majority." *Id.* A denial of this proportional opportunity under the existing voting system, said the court in *Pope*, was the "putative injury" suffered by a minority bringing a § 2 claim. *Id.* The *Pope* court concluded that "supported allegations that Plaintiffs reside in a reasonably compact area that could support additional MMDs [majority-minority districts]

sufficiently proves standing for a Section 2 claim for vote dilution" because the personalized injury is "that the apportionment of 4 MMDs to the sufficiently numerous and geographically compact minority population, as opposed to the 5 MMDs that Plaintiffs contend are required by the VRA, dilutes Plaintiffs' individual voting power—including those in existing MMDs." *Id.*

Supporting this conclusion is other Supreme Court language, not cited by the *Pope* court, indicating that the injury suffered by a § 2 plaintiff asserting a claim that additional minority opportunity districts are required goes beyond the boundaries of a single district and includes a geographic area. In *Shaw v. Hunt*, the Court stated that "[i]f a § 2 violation is proved for a particular area, it flows from the fact that individuals in this area 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' 42 U.S.C. § 1973(b)." 517 U.S. 899, 917 (1996). In *De Grandy*, the Court recited "how manipulation of district lines can dilute the voting strength of politically cohesive minority group members, whether by fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them, or by packing them into one or a small number of districts to minimize their influence in the districts next door." 512 U.S. at 1007 (citing *Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993)).

Thus, while the Court has said that § 2 rights are individual rights and not the right of the minority group as a whole, a claim that an additional minority opportunity district is required concerns individuals in a particular geographic area. As described in *De Grandy*, the basis of such a § 2 results claim in the single-member district

context is typically cracking or packing (or a combination of them). The claim will generally thus involve two or more districts within the geographic area where minority population is cracked or one or more districts in which the minority population is packed (and from which additional districts could be drawn), or some combination.[22] A voter such as MALC member Abel Herrero, who lives in HD34, essentially lives in an allegedly packed district because MALC's claim is that the Latino population in the area is sufficient for two Latino opportunity districts, but the plan contains only one. *See, e.g., Barnett v. City of Chicago*, No. 92 C 1683, 1996 WL 34432, at *5 (N.D. Ill. Jan. 29, 1996) (finding standing where "[p]laintiffs allege that many of their class members live in packed wards which could be redrawn into non-excessive majority African American wards"). Thus, the claim focuses on Herrero's district in the context of the broader geographic area.

For these reasons, this Court agrees with the conclusion of *Pope* and holds that plaintiffs who reside in a reasonably compact area that could support an additional minority opportunity district have standing to pursue § 2 claims, even if they currently reside in an opportunity district. Herrero would have standing to

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[22] In *LULAC v. Perry*, 548 U.S. 399, 437, 504 (2006), Justice Kennedy stated that the question was "whether line-drawing dilutes the voting strength of the Latinos in District 23," disagreeing with Chief Justice Roberts' framing of the § 2 inquiry as "whether line-drawing in the challenged area as a whole dilutes minority voting strength." But the focus of this disagreement was not whether additional minority opportunity districts could be drawn in West Texas, but whether CD23 had been impermissibly diluted.

bring these claims in his own right, and thus MALC has representational standing to assert these claims.

In sum, MALC has standing to bring its challenges to Plan H358's configuration of Nueces County on two theories. First, MALC has organizational standing based on the loss of Raul Torres's seat in HD33 and its resulting loss of a member. Second, MALC has associational standing to represent the interests of its members because MALC member Abel Herrero would have standing to sue in his own right.

Analysis of the Merits

Having determined that MALC has standing to assert its claims, the Court considers its § 2 results claim. MALC offers two demonstration plans: Plan H400 and Plan H391. In Plan H400, Korbel drew two majority-HCVAP districts (55.2% HCVAP HD32 and 59.9% HCVAP HD34 using 2011-2015 ACS data) wholly within Nueces County, but found their performance on his exogenous election index to be so low as to indicate a lack of real electoral opportunity in both districts. Tr28; MALC-13 at 2. HD32 performed in 7/35 statewide elections (both state and federal), and HD34 performed in 0/35 statewide elections between 2010 and 2016. Tr28; MALC-13.

Despite its lower SSVR (ranging from 47.2% in 2010 to 47.7% in 2016), HD32 performed for Democrats (presumed to be the minority preferred candidate) in 4/5 elections in presidential election year 2012 and 3/8 in presidential election year 2016, but not at all in the non-presidential years, when Latino voter turnout is typically lower. MALC-13. And despite its higher (and increasing) SSVR (ranging from 50% in 2010 to 51.9% in 2016), HD34 did not perform at all in any year. *Id.*

Therefore, in Plan H391, Korbel "open[ed] up the county line" to draw two districts that would perform sufficiently to create "effective" Latino opportunity districts. Tr28; MALC-17 (Korbel Report) ¶ 80. The simplest way to accomplish this would be by adding Hispanic population from another county to a Nueces County district or placing Nueces County Anglo population in a district based outside Nueces County, either of which would break the Nueces County line only once. But Korbel testified that he could not create two effective districts by breaking the county line only once, and thus he maintained HD34 in a configuration very similar to that in Plan H358, removed Anglo Nueces County population and joined it with HD30 in Aransas, Calhoun, and Victoria Counties, and then joined the remainder of Nueces County in HD32 with all of Kleberg County.[23] Tr29; MALC-17 ¶¶ 80-82. This resulted in two districts with higher HCVAP than in Plan H400: HD32 in this plan is 61.2% HCVAP and HD34 is 66.4%. We are not informed of the specific performance of HD34, but since it maintains its general location and high HCVAP (66.4%) and SSVR (59.2%), presumably it would perform effectively. Proposed new HD32 performs 0/10 in 2010, 4/5 in 2012, 2/12 in 2014, and 6/8 in 2016 on Korbel's index. MALC-24.

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[23] MALC's demonstration Plan H295 also breaks the Nueces County line two times–first by joining part of San Patricio County with HD34, and second by removing part of Nueces County population and joining it with HD32 in Aransas County. And demonstration Plan H205 took a similar approach, yet broke the county line a third time by joining some Nueces County population with HD43 to the south.

To establish its claim, MALC must first establish the three *Gingles* preconditions: (1) the racial group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the racial group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). If MALC satisfies these three preliminary requirements, it must then satisfy the ultimate § 2 inquiry by showing from the "totality of the circumstances" that Hispanics have less opportunity than do other members of the electorate to participate in the electoral process and elect candidates of their choice.

The first *Gingles* precondition includes the requirements of numerosity and geographical compactness. For the numerosity requirement, the Court agrees with the Second Circuit in *Pope v. Albany County*, that a plaintiff need only show a simple majority of the relevant minority group (here, HCVAP) at the first *Gingles* step. "[T]his initial majority-minority inquiry serves a useful gatekeeping role by identifying, in broad terms, when a minority group has at least 'the *potential* to elect representatives in the absence of the challenged structure or practice.'" 687 F.3d 565, 575 (2d Cir. 2012) (quoting *Gingles*, 478 U.S. at 50 n.17). The court there noted that

> [t]he relative size of a minority group's majority in a district may well be among the totality of circumstances that can inform the ultimate determination of vote dilution and the appropriate remedy. But it is simply the fact, not the size, of a minority group's majority presence in a proposed

> district that permits a plaintiff to satisfy the first of *Gingles*'s preliminary requirements.

Id. at 574.[24] Thus, concerns about whether Hispanics have a "realistic" potential to elect representatives considering such things as voter registration rates and turnout "may well warrant careful consideration when a court reviews the totality of the circumstances in deciding the ultimate *Gingles* inquiry . . . [and] may also inform the appropriate remedy for a Section 2 violation." *Id.* at 575. Both of MALC's demonstration maps include two districts with greater than 50% HCVAP and thus satisfy the numerosity threshold.

In Plan H400, Nueces County is divided into two compact districts— HD32 and HD34. Although Corpus Christi is split, its population is too large to be placed entirely within one district, and it is likewise split in Plan H358. In Plan H391, HD34 tracks most of existing HD34, changing some boundaries only within Corpus Christi, and it includes Rep. Herrero's residence. Thus it can be said to respect the traditional redistricting principle of respecting existing district lines and member/constituent relationships. And the County Line Rule dictates that the remainder of Nueces County be joined with an entire

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[24] The Second Circuit indicated that its position was in accord with the Fifth Circuit's decision in *Westwego Citizens for Better Government v. City of Westwego*, 946 F.2d 1109 (5th Cir. 1991). The Fifth Circuit did not expressly decide this issue, but did say that the "potential to elect" is all that is required under § 2 such that "[a]ll that must be shown is that 'the minority's voting age population exceeds 50%.'" *Id.* at 1117 n.9. However, the Court also referred to testimony that the minority-preferred candidate would have won, and noted that "it is entirely proper to refer to evidence other than census data to establish the 'potential to elect.'" *Id.* at 1117 & n.10.

county, and thus, under the strictures of the County Line Rule, HD32 reflects a compact community insofar as it connects the remaining Nueces County population to the whole of adjoining Kleberg County. But the fact that Plan H391 must also then excise Anglo population in two distinct areas in Nueces County (from both HD32 and HD34) joined only by water is troubling. If all that were required was to add adjoining similar Hispanic population from Kleberg County that would otherwise be separated solely by operation of the County Line Rule, the case for compactness would be much more compelling.[25] However, the Court will assume for sake of argument that Plan H391 also demonstrates compactness.[26]

The second and third *Gingles* requirements have already been established for Nueces County. This Court

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[25] For example, if an identifiable compact community straddled the county line and thus would be divided solely by operation of the County Line Rule, keeping that community whole to provide voting opportunity where it would otherwise be lacking would present a strong case. However, MALC's demonstration maps indicate that creating two "effective" districts is not so simple. In MALC's demonstration Plan H205, Nueces County is placed into *five* districts. In MALC's Plan H295, HD32 takes part of Nueces County in two separate areas as well as part of San Patricio County, and HD34 spills out of Nueces County into the northern and eastern portions of San Patricio County.

[26] The Court notes that in MALC's demonstration Plan H201—its Whole County Plan that minimized county line breaks (it has three)—MALC left HD33 and HD34 wholly within Nueces County and then excised 6% of Nueces County's population (that was 76% Anglo) and joined it with HD32. However, rather than excising a whole area, it cherry picks several distinct areas along the Corpus Christi coast. But it demonstrates that, in the earlier phase, MALC proposed a plan with only one county line break related to Nueces County.

found legally significant racially polarized voting between Latinos and non-Latinos in Nueces County. Docket no. 1390 at 48. After examining the data and conclusions provided by several experts, the Court found that Latinos in Nueces County are highly cohesive, and that Anglos vote as a bloc usually to defeat minority preferred candidates.[27]

The updated expert analysis continues to show high levels of racially polarized voting in Nueces County. *E.g.*, MALC-22 Table 3. Plaintiffs have also provided expert testimony from Dr. Brischetto showing racially polarized voting in Kleberg County and the 52 South Texas counties, which includes Kleberg County. Brischetto 2014 Report Table 7; MALC-22 Table 4.

The Court thus turns to the totality of circumstances analysis. As noted, the County Line Rule would dictate that two districts be drawn wholly within Nueces County. When MALC's expert attempted to draw two HCVAP-majority districts, he felt that Latinos were essentially worse off than under Plan H358 because one district would not perform at all and one performed poorly (compared to Plan H358, where one district does perform

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[27] The Court found extreme levels of racially polarized voting, and noted that, even if Defendants correctly argued that Plaintiffs must prove a non-partisan/racial basis for the polarization, Plaintiffs sufficiently did so by demonstrating racially polarized voting in the primaries. Dr. Engstrom analyzed both general elections and primaries and found legally significant racially polarized voting in both. Dr. Alford, Defendants' expert, endorsed Dr. Engstrom's methodology and report, and agreed that the levels of bloc voting (levels in the 90/10 range) found by Dr. Engstrom were legally significant. Docket no. 1390 at 50-51 n.50.

consistently for Latinos[28]) Thus, the logic goes, application of the County Line Rule, combined with other factors, is responsible for the vote dilution, and the County Line Rule must yield. But the Court finds that while MALC may have shown that Hispanics are entitled to two opportunity districts in Nueces County, it has failed to show that the County Line Rule must yield.

As this Court explained in its opinion on Plan H283, the VRA can require the State to violate the County Line Rule. Docket no. 1365 at 16-21. Traditional districting principles such as the County Line Rule may be subordinated to race to remedy a § 2 violation, so long as it is no more than reasonably necessary to comply with § 2. *Id.*

MALC contends that the two districts wholly within Nueces County shown in Plan H400 do not provide electoral opportunity because they do not perform sufficiently on Korbel's exogenous election index, and thus the County Line Rule must yield to allow creation of districts with better performance. This Court has already concluded that the results of an exogenous election index alone will not determine opportunity. Such indices often do not mirror endogenous election performance, though in demonstration districts we do not have the benefit of actual elections in the district to study. Rather than just relying on an exogenous election index to measure opportunity, the Court must conduct an intensely local appraisal to determine whether real electoral opportunity exists.

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[28] HD34 performance in Plan H358 is 5/10 in 2010, 5/5 in 2012, 10/12 in 2014, and 8/8 in 2016 28 under Korbel's index. MALC-13; Tr26-28. HD32 does not perform at all.

The totality of the circumstances inquiry directs us to consider the Senate factors. "Another relevant consideration is whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area." *LULAC*, 548 U.S. at 426. Although statewide Hispanics lack proportionality, in Nueces County they are around 56% of the relevant population (CVAP) and they have one of two (50%) of districts. Creating a second district would result in over-representation in Nueces County, but Hispanics statewide would still be under-represented.

Turning to the Senate factors, the Court need not again review the history of voting-related discrimination. Texas has a long history of such discrimination, and the Court found intentional vote dilution in the Legislature's enactment of the 2011 plan.

Another key Senate factor is the extent of racially polarized voting in the political subdivision. As discussed above, not only does racially polarized voting exist in Nueces County and its house district elections, the level is high, and the high degree of Anglo bloc voting plays a role in the defeat of Hispanic candidates. Dr. Engstrom found that, in the general elections, Latino support for the Latino Democratic candidate consistently exceeded 90%, while non-Latino support ranged between 7.5% and 17.6%. Docket no. 307-1 Table 2. This is similar to polarization levels that the Supreme Court characterized as "especially severe" in *LULAC v. Perry*, 548 U.S. 399, 427 (2006) (noting that 92% of Latinos voted against Bonilla while 88% of non-Latinos voted for him).

In the 2010 general election in HD33, in which incumbent Solomon Ortiz, Jr. was defeated, Latinos

supported Ortiz with 92.3% support, while non-Latinos gave only 11% support. Ortiz lost the election, receiving 47.49% (11,306 votes) of the vote to Torres's 52.51% (12,499 votes), a margin of only 1,200 votes. Latinos were only 45.08% of the turned out vote. Docket no. 1364 ¶ 234.

There was also extreme polarization in the 2012 HD34 general election, where Latinos supported Herrero with 95.55%, while non-Latinos gave only 11.09% support. MALC-161 Table 4. Non-Latinos voted cohesively in favor of Anglo incumbent Connie Scott with 88.91% of the vote, and Latino support was 4.45%. *Id.* Despite this extreme polarization, Herrero won the election with 57.17% (25,482) of the vote to Scott's 42.83% (19,088 votes). Countywide, Dr. Brischetto found that less than half (44.1%) of voters in the 2012 general election were Latino. MALC-161 ¶ 46 & Table 3 (approximately 42,000 voters were Latino and 53,000 were non-Latino). The Spanish Surname turnout (SSTO) was 55.1%. D-109 at 57. Hispanics were 68.2% of the CVAP in HD34 using 2011-2015 ACS data.

Another Senate factor is the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process. There was evidence in the prior phase showing that Hispanics, including in Nueces County, suffer a "continuing pattern of disadvantage" relative to non-Hispanics.[29] They suffer disparities in health, income/

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[29] Docket no. 1364 ¶ 286. Korbel examined updated data and found that the information had not materially changed, and "[t]he large financial, educational, employment and social gap remains." MALC-

employment, and education, and these disparities are strongly associated with lower rates of registration, voting, and participation in the political system. *See* docket no. 1390 at 27; docket no. 1364 ¶ 286.

Thus, statewide, Hispanics generally have substantially lower voter turnout than do Anglos, often attributed to the lingering effects of past discrimination. *E.g.*, Joint Expert Ex. E-3 (Lichtman Report) ¶ 11.[30] But there are significant turnout differences across counties. Countywide, Dr. Brischetto found that less than half (44.1%) of voters in the 2012 general election were Latino. MALC-161 ¶ 46 & Table 3 (approximately 42,000 voters were Latino and 53,000 were non-Latino). And Dr. Engstrom's analysis of the 2010 HD33 general election in which Ortiz lost showed that Latinos were 45.08% of the turned-out vote. Docket no. 307-1 at 26. Thus, it appears that Latinos are turning out to vote in Nueces County at lower rates than non-Hispanics.[31]

Defendants contend that Latinos have been elected to public office in the jurisdiction in high numbers, demonstrating equal opportunity. The evidence shows that there have been a significant number of Latinos in

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17 at 2. Expert testimony also tied those lingering effects to past discrimination.

[30] Dr. Lichtman found the percentage of Hispanic VAP participating in elections was 14% statewide, and that it ranged from 4% to 19% of the VAP in the counties he studied. But he did not look at Nueces County. And he notes that this percentage is from the VAP, not the CVAP, and thus reflects the much lower citizenship rates for Latinos in certain areas.

[31] In 2011, the SSVR in Nueces County was just below 50%. The Court is not aware of any evidence showing the countywide SSVR% in 2013 or more recently.

elected office in Nueces County, including the county attorney, district clerk, three of eight district court judges, and three of eight Corpus Christi council members. Docket no. 1364 ¶ 285. And Latinos, such as Abel Herrero and Raul Torres, have been elected to house districts.

"The Report notes also that evidence demonstrating . . . that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value." *LULAC*, 548 U.S. at 426 (quoting *Gingles*, 478 U.S. at 44-45). MALC contends that the Legislature has a newfound appreciation for the County Line Rule and is using it pretextually to avoid creating Latino opportunity districts. The Court finds that the County Line Rule is a legitimate and important traditional districting principle in Texas. *See Clements v. Valles*, 620 S.W.2d 112 (Tex. 1981). Even though MALC presented evidence through its expert Korbel that the Legislature has not always adhered so strictly to the County Line Rule in the past, a violation of the County Line Rule could result in litigation on that basis. Though the Legislature used the County Line Rule for its political advantage in 2011 and 2013, the Court finds that it nevertheless must be respected unless § 2 requires otherwise.

Based on an analysis of the *Gingles* requirements and the totality of the circumstances, the Court finds that MALC has demonstrated that an additional compact minority district could be drawn in Nueces County—Plan H358 has one, when two could be drawn. Although Hispanic voters in Nueces County have a § 2 right to an additional district, the main question presented is whether it entitles them to a configuration such as that in

Plan H400 (two HCVAP-majority districts that are poorly performing or not yet performing) or a configuration such as that in Plan H391, where the County Line Rule is broken to create two "effective" districts.[32] To find that Plan H391 is appropriate, the Court must conclude that subordinating the County Line Rule is necessary to comply with § 2. But the Court concludes that Plaintiffs have not adequately demonstrated that they lack equal opportunity in a configuration such as that in Plan H400 such that a county line break is necessary.

Certainly the high levels of racially polarized voting and the lingering effects of past discrimination affecting voter turnout weigh in MALC's favor. This Court previously discussed how Plaintiffs could assert that HCVAP-majority districts do not present real electoral opportunity due to racially polarized voting and lower registration and turnout caused by the lingering effects of official discrimination. But there is simply not enough evidence to conclude that the districts in Plan H400 do not provide real electoral opportunity.

Nueces County was estimated to be about 56% HCVAP in 2010. Docket no. 1364 ¶ 237. Its growth between 2000 and 2010 was Hispanic growth, as both African-American and Anglo population declined, and its HCVAP continues to climb. *Id.* Hispanics are being elected to countywide offices and as house district representatives, indicating a lack of barriers to candidacy and election. Although Dr. Brischetto found that, given the high levels of racially polarized voting, minorities generally win in districts only if the combined minority

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[32] A third option is to maintain the current configuration (one safe district and one not).

VAP exceeded 66%, his analysis also showed Abel Herrero won HD34 with HCVAP levels of 59.4% in 2004 and 2008. MALC-165; MALC-166 Table 1. In Plan H400, proposed HD34 has an HCVAP of 59.9%. Although the HCVAP in proposed HD32 is lower at 55.2%, that district provides opportunity, at least in presidential election years, under Korbel's index.[33]

Further, whether Hispanics win elections is not the same thing as whether they have the *opportunity to win* elections. *LULAC*, 548 U.S. at 428 ("The circumstance that a group does not win elections does not resolve the issue of vote dilution."). In 2008, HD33 (60.4% HCVAP) and HD34 (58.2% HCVAP) were performing Latino opportunity districts with total SSVR of 54.3% and 53.6%, respectively.[34] D-100. In 2010, they were still Latino opportunity districts, but the Latino-preferred candidate lost (though by only 1,193 votes and 2,037 votes). Korbel's analysis was the only election analysis of the proposed districts in Plan H400. Most of the elections in his index did not involve a *Latino* Democrat candidate, who would presumably be the Latino-preferred candidate. Such elections would be more probative because Latinos would have a "horse in the race."

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[33] In *Salas v. Southwest Texas Jr. College District*, 964 F.2d 1542, 1556 (5th Cir. 1992), the Fifth Circuit held that the fact that Hispanics were 53% of registered voters was "persuasive evidence that Hispanic voters are not deterred from participation in the political process because of the effects of prior discrimination, including unemployment, illiteracy, and low income."

[34] In 2012, Herrero easily defeated Scott in the reconfigured "safe" Latino opportunity district HD34, and has not had a challenger since.

In addition, Korbel only looked at statewide races and no county races. Districts may perform quite differently in local elections than they do in state and federal elections. Thus, we know that Democrats in statewide elections and federal elections (President and U.S. Senate) would generally lose in these proposed districts, but we do not know how they might perform in local elections with Latino candidates. It is conceivable that, in competitive local races with Latino candidates, Hispanic voters would mobilize in significantly higher numbers.

Moreover, in Plan H400, both HD32 and HD34 include demographic distributions strongly favoring Hispanic voters. In HD32, with 55.2% HCVAP, there are approximately 68,700 Hispanic citizens of voting age and only 55,800 non-Hispanics.[35] Thus, there are approximately 13,000 more Hispanic citizens of voting age than all other groups combined. In HD34, with 59.9% HCVAP, there are approximately 73,500 Hispanic citizens of voting age, compared to 49,000 non-Hispanics.[36] Thus, there are approximately 24,500 more Hispanic citizens of voting age than all other groups combined. These numbers translate into a significant advantage in house district elections, given that in none of the elections analyzed by Korbel did more than approximately 50,000 total voters even participate in either HD32 or HD34, and

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[35] 2011-2015 ACS data show approximately 124,510 citizens of voting age in HD32, 55.2% of whom (68,729) are Hispanic. MALC-13 (Red-116 Report) at 5. Thus, the Court counts the remainder (~55,800) as non-Hispanic.

[36] 2011-2015 ACS data show approximately 122,645 citizens of voting age in HD34, 59.9% of whom (73,464) are Hispanic. MALC-13 (Red-116 Report) at 5. Thus, the Court counts the remainder (~49,200) as non-Hispanic.

in non-presidential election years the number was closer to 30,000 voters.[37] In other words, if these Hispanic citizen voting age persons registered and turned out (and voted cohesively), they could easily control elections.

As noted, Korbel found that HD32 performed 0/10 in 2010, 4/5 in 2012, 0/12 in 2014, and 3/8 in 2016, with the unsurprising trend that performance for Latinos increased significantly in presidential election years. Although Korbel did not include 2008 in his chart, he did include the underlying election data, and using his criteria, the Latino-preferred candidate (Democrat) received more votes than the Republican candidate in 8 of 8 elections. MALC-13 at 10. Similarly, although Democrats won no elections in HD34 in 2010 through 2016 in Korbel's index, they received more votes than Republican candidates in 4 of 8 elections in 2008 (and lost two by margins of .2 and .4%). *Id.* This also indicates that the districts provide potential to elect.

Although it cannot be denied that Hispanics suffer the effects of lingering discrimination and that this affects their voting and turnout, the Court finds that Hispanics

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[37] In presidential election years, voter turnout levels were around 50%. In 2008, the HD32 turnout was 50,567 voters and the HD34 turnout was 53,493 voters. MALC-13 at 7. In 2012, the HD32 turnout was 46,044 voters and the HD34 turnout was 51,757 voters. *Id.* at 17. In 2016, HD32 had 47,927 voters and HD34 had 56,626 voters. *Id.* at 21.

In non-presidential years, total voter turnout was around 30%. In 2010, there were 29,044 voters in HD32 and 32,965 voters in HD34. MALC-13 at 11. In 2014, HD32 had 27,250 voters and HD34 had 30,825 voters. *Id.* at 22. Given these numbers of total voters, the fact that Hispanics have 13,000 more citizen voting age persons in HD32 and 24,500 more in HD34 than all non-Hispanics combined is significant.

have equal opportunity in two districts drawn wholly within Nueces County (or at least MALC has failed to show that they do not).[38] These districts may not be the best configuration for minority success, but the "ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success." *LULAC*, 548 U.S. at 428. Based on the evidence before the Court, breaking the County Line Rule twice to remove Anglos and incorporate even more Hispanics to improve electoral outcomes goes beyond what § 2 requires.

In sum, Nueces County had two minority opportunity districts, but they could not be maintained in their benchmark configurations due to population loss. Rather than exploring whether two HCVAP-majority districts wholly within Nueces County should be drawn, the Legislature drew one safe district for Hispanics and one safe district for incumbent Republican Todd Hunter. The evidence shows that two HCVAP-districts could have been drawn that would provide Hispanics with equal electoral opportunity, and that § 2 could require those two districts. But the evidence does not show that the Legislature was required to break the County Line Rule to draw what Plaintiffs consider to be "effective" districts.

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[38] In *Gingles*, the Supreme Court noted that, "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U.S. at 50 n.17 (emphasis in original). Similarly, if they possess the potential to elect (real electoral opportunity) even with application of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. That Latino voters might be more successful under districts drawn without the strictures of the County Line Rule is not the relevant focus under § 2.

Thus, the Court must consider whether § 2 requires a remedy for this results violation. In addition, the Court previously found that the Legislature intentionally discriminated and violated one person, one vote principles in configuring the HD32/HD34 border in Plan H358, and that discrimination was purposefully maintained in Plan H358. That intentional discrimination requires a remedy.

This does not necessarily mean that two districts must be drawn in Nueces County as proposed in Plan H400. In *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003), the Supreme Court discussed the choice between "creating 'safe' districts . . . or a greater number of districts in which it is likely, although perhaps not quite as likely . . . , that minority voters will be able to elect their candidates." It noted,

> Either option will present the minority group with its own array of electoral risks and benefits, and presents hard choices about what would truly maximize electoral success. On one hand, a smaller number of safe majority-minority districts may virtually guarantee the election of a minority group's preferred candidate in those districts. Yet even if this concentration of minority voters in a few districts does not constitute the unlawful packing of minority voters, such a plan risks isolating minority voters from the rest of the State, and risks narrowing political influence to only a fraction of political districts. And while such districts may result in more "descriptive representation" because the representatives of choice are more likely to mirror the race of the majority of voters in that district, the

> representation may be limited to fewer areas. On the other hand, spreading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice. Such a strategy has the potential to increase "substantive representation" in more districts, by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group. It also, however, creates the risk that the minority group's preferred candidate may lose.

Id. at 480-81 (internal quotations and citations omitted). Thus, Plaintiffs should consider their preferred configuration for the remedy stage. But, as noted, the intentional discrimination previously found (and the one person, one vote violation) requires a remedy.

F. Midland/Ector Counties

MALC has consistently contended that a new Latino opportunity district was required in Midland and Ector Counties. No new Latino opportunity districts were considered or drawn in Midland/Odessa because the proposed HCVAP-majority districts all broke the County Line Rule. During the prior phase of litigation, MALC offered four plans that proposed a new Latino opportunity district in the Midland/Ector County area—Plans H205, H295, H329, and H360. In its Opinion on Plan H283, the Court found that Plaintiffs failed to prove the first *Gingles* precondition for the proposed districts in Plan H205 and H295 because they failed to demonstrate a compact minority population. The Court found that Plan H329 and Plan H360 were best considered in the 2013 plan trial phase because these plans were first introduced during

the 2013 legislative session. In the 2013 session, the Legislature continued its steadfast refusal to consider any districts that would cause a County Line Rule violation, and no new Latino opportunity districts were drawn in the Midland/Odessa area. *See, e.g.*, JX-15.3 at 126.

MALC continues to pursue its § 2 results claims. It notes that Hispanic growth requires a Latino opportunity district in Midland and Ector Counties despite the fact that its creation would violate the County Line Rule. MALC relies on Plan H329 and Plan H360, and now additionally offers Plan H321, a plan proposed by Rep. Martinez Fischer during the 2013 session. Tr175 (Martinez-Fischer); MALC-28 (plan map and data). MALC contends that HD81, which was 51.7% HCVAP using the ACS data available to the Legislature at the time, combines a "vibrant community of interest of cohesive Latino neighborhoods in Midland and Odessa" with seven other whole counties and dividing no other county line except Midland and Ector Counties. Docket no. 1525 at 16-17.

Plan H329 proposed HD81 with 55.3% HCVAP and 53.7% SSVR. MALC-14 at S47; MALC-96. In Plan H329, proposed HD81 takes in part of Midland and Ector Counties and large portions of West Texas, while HD82 takes in the remainder of Midland and Ector Counties. MALC also offers Plan H360 as a plug-in plan. MALC-91 (map). HD81 in this plan includes Ward, Crane, Upton, and minority parts of Ector and Midland Counties. Proposed HD81 is 50.1% HCVAP using 2008-2012 ACS data. MALC-93. HD82 takes the remainder of Ector County and Midland County and pairs them with Dawn, Martin, Andrews, and Winkler Counties. Korbel testified that the minority populations of Midland and Odessa are

only about 12 to 15 miles apart. TrJ1396. Plan H360 has no VTD splits. TrJ1398 (Korbel).

MALC's proposed districts satisfy the numerosity requirement and MALC offers strong evidence that the minority population is compact (especially as demonstrated by Plan H360 and the testimony of Luis Sanchez). *See LULAC*, 548 U.S. at 435 (members of a racial group in different areas could share similar interests and therefore form a compact district "if the areas are in reasonably close proximity"). MALC also offered testimony showing racially polarized voting between Latinos and non-Latinos in Midland and Ector Counties. TrJ947, TrJ969; MALC-161 (2014) (Brischetto).

But the Court cannot reach the merits of this claim (or any intentional vote dilution claim based on the failure to draw this district) because MALC lacks standing, and it is the only Plaintiff that has pled this claim. Although the Perez Plaintiffs have joined MALC (and LULAC has joined the Perez Plaintiffs for certain House claims) in this phase for litigation purposes, only MALC has pled a claim for vote dilution in Midland/Ector Counties, such that MALC cannot rely on the Perez Plaintiffs or LULAC for standing.[39]

MALC's arguments for standing to bring its claims in Midland/Ector Counties are essentially the same as its arguments for standing in Nueces County. Docket no. 1462 at 12. In particular, MALC argues that it has

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[39] The NAACP notes that it has members in Midland County, but the NAACP also did not plead a claim for a § 2 Latino opportunity district in Midland, so MALC cannot rely on the NAACP members' standing. Perhaps recognizing this, MALC seeks to rely on NAACP member standing only in Fort Bend, Harris, Dallas, Nueces, and Bell Counties. Docket no. 1462 at 5 n.1.

organizational standing to seek a remedy for an injury to itself as an organization and that it has representative/associational standing to sue on behalf of its members. As discussed above, MALC prevailed on both of these arguments with respect to Nueces County. But applying the same principles from that discussion, MALC's arguments fail in Midland/Ector Counties.

MALC does not fully describe how its claim to organizational standing would apply in Midland/Ector Counties. But the claim to standing here on this basis is far weaker than in Nueces County, where the changes to the House Plan directly caused MALC's membership to decrease because of the loss of Raul Torres's seat. In order to claim that Plan H358's configuration of Midland and Ector Counties injures it, MALC must argue that the configuration prevents MALC membership from growing. This basis for standing is too speculative, as it relies on the *possibility* that if such a district were drawn, it would elect someone who would then join MALC. Further, accepting this argument would mean that MALC would have similar standing in any county in which it argued that a district should be drawn that might elect a Latino. Unlike in Nueces County, where the record clearly demonstrates that the removal of HD33 decreased MALC's membership by ousting Torres, there has been no similar effect here. This theory does not support standing.

MALC's claim to representational standing in Midland/Ector Counties likewise fails. MALC argues that its "membership in the West Texas area includes a Latino member," without further elaboration. Docket no. 1462 at 12. Reviewing MALC's membership list, MALC has numerous members in the "West Texas area,"

particularly in the El Paso area. MALC-1. But the "West Texas area" is vast, and MALC has no members who represent districts containing any part of Midland or Ector County. The only MALC member who might be affected by MALC's proposed changes to these districts is HD74 representative Poncho Nevarez. In Plan H321, HDs 81 and 82 (containing Midland and Ector Counties) are reconfigured to slightly affect the northeast corner of Nevarez's HD74. In Plan H329, HD74 grows in the northeast to extend through Ward, Crane, and Upton Counties and encompass southern portions of Midland and Ector Counties. That Nevarez's district might be affected by the drawing of a new opportunity district is not alone sufficient to give MALC standing at the liability phase.

MALC has not put on evidence of where Nevarez resides within HD74, which would allow the Court to determine whether Nevarez himself lives in an area that is directly affected by either change. In any event, Nevarez resides in a Hispanic opportunity district in HD74. Thus, Nevarez's individual standing must be similar to that of Abel Herrero in Nueces County, who lives in an opportunity district yet has standing because of the packing in his district. But the essence of MALC's claim is that the Hispanic population in Midland/Ector Counties is cracked, not packed, and Nevarez does not live in the cracked area. And there is no allegation that Nevarez's district is packed and that unpacking it would create additional Latino opportunity. MALC's own

demonstration plans would increase the HVAP of HD74.[40] Stated differently, no MALC member suffers an injury in HD74 under Plan H358 because the evidence shows that the district is more "packed" under Plans H321 and H329 than it is in Plan H358.

HD74 is the only district home to a MALC member that could possibly be affected by the alleged vote dilution through cracking in Midland/Ector Counties. But the representative and resident of that district suffers no apparent harm from that vote dilution. For these reasons, MALC does not have standing to pursue its claims in Midland/Ector Counties, and these claims are dismissed.

G. Bexar County

This Court altered HD117 in Plan H309, and that new configuration remains in Plan H358. In its Opinion on Plan H283, the Court found that any § 2 effects claims in Bexar County were remedied and were thus moot, but it also found that Plaintiffs proved their intentional vote dilution and discrimination claims under § 2 and the Fourteenth Amendment regarding HD117. Plaintiffs succeeded on their "nudge factor" claims with regard to HD117 insofar as mapdrawers intentionally and successfully minimized Hispanic voter registration and turnout to decrease Hispanic performance.[41]

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[40] Under the challenged Plan H358, HD74 has a HVAP of 76.6%; under Plan H321, HVAP increases to 77.3%; under Plan H329, HVAP increases further to 78.5%.

[41] The Court also found that the Task Force Plaintiffs succeeded in their *Shaw*-type racial gerrymandering claim with regard to HD117.

MALC[42] asserts claims that Plan H358 did not fully remedy the intentional discrimination in HD117, and proposes changes shown in Plan H391. Docket no. 1462 at 12-13; Tr55-56 (Korbel). MALC's expert opined that the 2014 election returns show that HD 117 "does not perform sufficiently for Hispanic citizens to elect their candidate of choice" and "[g]iven the finding of discriminatory intent with respect to HD 117, a full remediation is appropriate." Tr804; MALC-17 (Korbel Report) ¶ 86. Korbel bases his conclusion that HD117 did not sufficiently perform for Latinos to elect their candidate of choice on endogenous election results in 2014 because the Latino candidate of choice did not prevail in 2014.[43] Tr804. He stated that the exogenous election results were "not particularly helpful." *Id.* MALC proposes the configuration in Plan H391, which "strengthens the electoral performance of HD 117." *Id.* ¶ 87.

This Court remedied the nudge factor claim in Plan H309 and returned HD117 to opportunity status. The fact that HD117 did not perform in 2014 does not show that it was not fully remedied—even before application of the "nudge factor," HD117 did not always perform for Latino-preferred candidates, as evidenced by Garza's win in 2010. There is no evidence from which to conclude that the

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[42] MALC member Philip Cortez resides in HD117. MALC-1 at 3.

[43] Philip Cortez won two of three elections since this Court modified HD117 in Plan H309. Tr56-57. Dr. Brischetto's EI analysis of five statewide general elections found continued racially polarized voting in Bexar County in 2014 and 2016, with Latino voters cohesively supporting the Democratic candidate between 80.6 and 81.6% and Anglo voters supporting the Republican candidate at 76.1% and 82.8%. Tr85; MALC-22 Table 8.

intentional discrimination found by this Court continues in HD117 in Plan H358.

No further changes are required in Bexar County.

H. Tarrant County

In its Opinion on Plan H283, the Court rejected Plaintiffs' packing and cracking claims. However, the Court found that mapdrawers increased the SSVR of HD90 in bad faith (to claim offset for the loss of HD33) and to simultaneously shore up the Anglo population of HD93.

In 2011, during the "member-driven" redistricting process, the Tarrant County delegation submitted an agreed map, and Rep. Lon Burnam (HD90) and Rep. Marc Veasey (HD95) approved their districts. Later in the process, mapdrawers and redistricting leadership decided to increase the SSVR of HD90 above 50% in an attempt to offset the loss of Latino opportunity district HD33 in Nueces County for § 5 purposes. They increased the SSVR by manipulating population based solely on race, including by removing the predominantly African-American community known as Lake Como.[44]

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[44] This Court's Order noted that, in increasing the SSVR of HD90, mapdrawers fixated solely on the 50% racial target and moved a significant number of individuals on the basis of race:

> There is undisputed evidence that mapdrawers manipulated the population based on race, removing some areas and swapping out population to increase the SSVR of HD90 from 40/41.9% in Plan H113 to 47.9/50.1%. There is little indication that they cared about traditional redistricting factors or maintaining communities of interest; they were only concerned with raising the SSVR to 50.1%. The district became the most underpopulated district in the plan. The African–American community of Como was removed from

MALDEF had advocated for the HCVAP in HD90 to be increased, and the Task Force Plaintiffs argue now that there was nothing wrong legally with raising the SSVR in HD90 in 2011.[45] Regardless of whether § 2 required that the SSVR in HD90 be raised in 2011 so that Latinos could control Democratic primaries, it is clear that the Legislature's motive for the change was to undermine Latino opportunity rather than enhance it. There is no indication that the Legislature undertook any analysis of whether HD90 was a performing district or whether it needed an increase in SSVR to become a performing district.[46] Rather, they increased its SSVR because it was already electing a Democrat, so raising the SSVR would not cost them politically, and they attempted to use the increase to offset the loss of HD33. The D.C. Court properly rejected this claim, noting that "all the

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> HD90 and placed into a Republican district represented by Anglo Rep. Geren. Other population was swapped between HD90 and HD95, and between HD90 and HD93. Overall, substantial Anglo population was removed (approximately 12,000 total population and 11,000 VAP), while Black+Hispanic total population and B+HVAP was increased.

Docket no. 1365 at 70.

[45] In this phase of the litigation, the Task Force has argued that Lon Burnam was not the Latino candidate of choice. However, in 2011 the Task Force also advocated for the Legislature to increase the HCVAP/SSVR in HD148, where there appears to be no dispute that Jessica Farrar was the Latino candidate of choice.

[46] Burnam had been HD90's representative since 1996. Tr205 (Burnam). Between 1996 and 2012, Burnam did not draw a challenger in the Democratic Primary. Tr226-27 (Burnam). Rep. Veasey had stated on the House floor that HD90 was already a performing opportunity district, and there is no indication that the Legislature believed otherwise.

experts' election analyses show[ed] that" that it was already an ability district. *Texas v. United States*, 887 F. Supp. 2d 133, 176 (D.D.C. 2012). They also used the increase in HD90 to try to pre-empt any § 2 claims based on the failure to increase the number of Latino opportunity districts statewide. The changes to HD90 also allowed them to shore up the Anglo population of HD93. Docket no. 1365 at 71.

Reps. Burnam and Veasey opposed the changes during the 2011 session, particularly the removal of Como from HD90. Burnam stated on the floor that the district had essentially been the same since its creation in 1978, and he and Veasey both argued that Como should be in HD90. Burnam's proposed amendment to return Como to HD90 was tabled.[47]

The Tarrant County configuration from Plan H283 remained unchanged in Plan H309. However, changes were made during the 2013 session to HD90, HD97, and HD99 and incorporated into Plan H358. The main change returned the Como community to HD90. The Task Force Plaintiffs bring claims targeted at this change.

The NAACP Plaintiffs, MALC, and Perez/LULAC Plaintiffs bring claims for intentional discrimination in Tarrant County. No party advocates for the creation of an additional minority opportunity district under the § 2 results test, but they contend that the intentional discrimination/vote dilution found by this Court in Tarrant County requires a remedy that maintains or enhances minority opportunity. Their proposed remedies

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[47] A complete description of what transpired is included in the Court's fact findings, docket no. 1364 ¶¶ 619-634.

are shown in Plan H391 (MALC)[48] and Plan H392 (NAACP).[49] Because those plans and arguments go to remedy rather than liability, the Court will consider them at the remedial phase. The Court thus turns to the Task Force's claim regarding changes made to HD90 in Plan H358.

I. HD90

The Texas Latino Redistricting Task Force challenges HD90 in plan H358 as both a racial gerrymander (a *Shaw*-type claim) and as dilutive of Latino voting strength in violation of § 2 and the Fourteenth Amendment. Docket no. 891 ¶¶ 41, 78-79; docket no. 1468.

After the 2011 session in which the SSVR of HD90 was increased in part by removing Como from the district, Como residents had written to and called Burnam expressing their desire to be returned to his district.

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[48] MALC's Plan H391 redraws all of the districts in Tarrant County and "eliminates or reduces the splitting" of numerous cities within the County. MALC-17 (Korbel Report) ¶ 62. Korbel states that Plan H358 contains three performing minority opportunity districts (HD90, HD95, and HD101), and that while two are compact, HD90 arguably is not. *Id.* ¶ 66. According to Korbel, Plan H391 proposes four "minority opportunity districts" in Tarrant County—majority-BCVAP (50.8%) HD95, majority-HCVAP (51.1%) HD90, and B+HCVAP-majority coalition district HD101, and HD93, which would not be a coalition district because its H+BCVAP is below 50% (27% BCVAP and 15.9% HCVAP) but would provide electoral opportunity. *Id.* ¶¶ 67-71.

[49] The NAACP contends that HD101 is a minority coalition district protected by § 2 and that any remedy for found violations in Tarrant County should preserve this district. Docket no. 1529 at 61. In NAACP demonstration Plan H392, HD95 is converted from 49.3% BCVAP to 51.7% BCVAP. HD90 remains HCVAP-majority and HD101 remains H+BCVAP majority.

Tr231 (Burnam). Both Geren and Burnam knew that Como's residents wanted to be in Burnam's district. *Id.*; D-731 (letter sent from Como community leader Dorothy DeBose to Burnam, expressing a desire to be returned to Burnam's district; a copy was also sent to Geren. Tr631 (Kenney)). Burnam too wanted Como back in his district. Tr231 (Burnam).

In the 2012 Democratic Primary, a Latino candidate, Carlos Vasquez, challenged Burnam. Burnam attributed the removal of Como from his district as the reason he drew a challenger in 2012 for the first time in 16 years. Tr227. Burnam won the primary by 159 votes and went on to win the general election in November 2012. TF-58; Tr312 (Espino). Vasquez received 70.6% of the Hispanic vote. D-424 at 20. Burnam received 74.3% of the Anglo vote and 62.3% of the African American vote. *Id.*

In the 2013 special session, Burnam successfully returned Como to his district. Burnam instructed his chief of staff Conor Kenney to draw an amendment to return Como to HD90. According to Kenney, Burnam provided two initial instructions—keep the amendment simple by involving only two (or maybe three) members,[50] and bring Como back into HD90. Tr635 (Kenney). Working from these instructions, Kenney created an initial draft map—Plan H328—with an SSVR of 48.2%, a decrease from the 2011 Plan. Tr639 (Kenney); Tr210 (Burnam); D-799. Kenney sought an "informal kind of temperature check" on this draft from Representative Martinez-Fischer and Martin Golando of MALC, who expressed concerns over the low SSVR. Tr638 (Kenney).

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[50] This was to comply with Chairman Darby's constraints on proposed amendments.

Kenney began re-working Plan H328 while keeping an eye on SSVR, which he discussed with Burnam. Tr640-41 (Kenney). Burnam instructed Kenney to "draw a version that does a little more swapping between 90 and 99 that restores the SSVR level back up to . . . the plan that we were amending." Tr641 (Kenney). Kenney started by swapping whole precincts between the districts, but quickly began trading populations at the block level, using racial shading and HVAP as a proxy for SSVR. Tr643-44 (Kenney). Kenney said he "spent hours trading things back and forth," and tracked SSVR as he went. Tr649 (Kenney). Kenney never considered election or political data outside of SSVR. Tr645 (Kenney). The finished product—Plan H342—had an SSVR of 50.1%, which was a decrease from the 2011 Plan but nevertheless met the 50% target. D-800 at 2. In Kenney's opinion, this configuration represents the highest possible SSVR when working under Burnam's other two instructions of returning Como and swapping only with HD99. Tr649-50 (Kenney).

In Burnam's words,

> The first [map] that we drew [H328] that got Como in there had too much of an impact on the Hispanic percentage of voters, and so we really made some ugly lines to—basically we got rid of every white voter near the western boundary of the district to keep the Hispanic vote over 50 percent, but to get Como back into the district [in H342].

Tr210. Burnam added that "there were too many white people" in H328's HD90. Tr212. According to Burnam, the purpose of moving white voters into HD99 was to create a 50+% SSVR district. Tr217.

Burnam's descriptions of the use of race to create a 50%+ SSVR district were not limited to generalities. *See* Tr215-16 (Burnam) ("[I]s it correct to say that from your first amendment in 2013 till your second amendment in 2013 you attempted to bring up the [SSVR] by removing white voters from the district?" . . . "Correct."). Burnam identified boundaries in the following neighborhoods and precincts that were split or relocated entirely in order to remove Anglo population from HD90: Samson Park, Montgomery Plaza Redevelopment, Precinct 4068, Precinct 4493, Precinct 1015, and Precinct 1674. Tr217-18, 222-26. In other cases, Hispanic areas were brought into HD90 to increase SSVR; Burnam identified portions of Precincts 4125, 1434, and 1408 as examples. Tr222, Tr225. Furthermore, Burnam testified that minimizing population deviation in the district was "lost in the process" because "we had to deal with taking as many white folks out as we could." Tr215.

The finished version (Plan H342 or "the Burnam amendment") modified only the western boundary of the district by mostly trading populations with HD99 in an effort to return Como to HD90 while also keeping HD90's SSVR above 50%. But the amendment also affected the boundaries of a third district—HD97, which borders HD90 to its south and west. Precinct 1472 in HD97 is an area of railroad tracks and contains no population. In order to make Como (in Precinct 1120 to the immediate north) contiguous with the rest of HD90, Burnam's amendment placed this portion of HD97 into HD90. Tr213 (Burnam). Representative Craig Goldman of HD97 agreed with this change. Tr213 (Burnam). In a second spot on HD90's western boundary, HD97 moves Precinct 1434 into HD90. Burnam provided the only evidence

regarding the reason for this change: "It's low income and Hispanic." Tr225 (Burnam).

On June 20, 2013, Rep. Burnam offered the final version—Amendment No. 8 (Plan H342)—on second reading. Rep. Burnam stated,

> The original amendment has the intent of returning the neighborhood [Como] to District 90 that has always been in District 90 since the federal court created it back in 1978. The amendment to the amendment corrects some numbers a little bit. It has an impact on Craig Goldman's district, but the precinct that is added into my district has no population; it's just a connector precinct. It has an impact on Chairman Geren's district, but basically what it does is take the African American and Hispanic population out of Representative Geren's district and puts some of my Anglo population into his district. I believe it's acceptable to the author.

JX-17.3 at 29. Chairman Darby then stated, "Members, Representative Burnam has revised his amendment and it now keeps this district a Hispanic district—brings the numbers back over 50 percent. That was the objection. I believe Representative Geren is in favor of this amendment also, so with that I would move to accept this amendment." JX-17.3 at 29. It was adopted.

The first election under this new map, which included the Burnam Amendment, was the 2014 Democratic Primary, in which Ramon Romero, Jr. challenged Burnam. By all accounts, the race was a hostile one—the Task Force presented evidence of fliers, phone calls, and online posts that highlight this hostility. *E.g.*, Tr319-20 (Espino testifying about Latin Kings flier); Tr321 (Espino

testifying about Fake Democrats image). In Como's Precinct 1120, Burnam won 383 votes of 471 votes cast. TF-39 at 2; Tr317 (Espino). But Romero defeated Burnam by 110 total votes. D-920 at 3. According to Dr. Engstrom's multivariate analysis of the race, Romero received 78.2% of the Latino vote, 12.6% of the African-American vote, and 24.3% of the remaining votes. TF-19 at 31. After defeating Burnam in the 2014 primary, Romero went on to win the general election. Tr341-42 (Espino). Since then, Romero has not faced a challenger in the primary. Tr342-43 (Espino).

The Task Force Plaintiffs argue that Burnam returned Como to HD90 to protect himself against a Latino challenger in the Democratic primary, and thus to intentionally dilute Latino voting strength. They assert that the heavily African-American community of Como was not likely to support a Latino challenger, that Burnam knew this, and that Burnam wanted Como back at least in part for that reason. They further assert a *Shaw*-type racial gerrymandering claim because, regardless of intent, the changes to HD90 were predominantly based on race without a compelling state interest. The Court finds that the Task Force has standing to assert both claims because at least one member of HOPE is a registered Latino voter in HD90. Docket no. 1314-1 at 3; TF-21.[51]

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[51] In its previous opinion on the 2011 Congressional Plan, this Court held that "the Task Force has associational standing based on the standing of the individual members of its constituent organizations such as HOPE and NOMAR." Docket no. 1390 at 94 n.82 (collecting cases).

The Court first considers the Task Force's *Shaw*-type claim. The Court does not find that returning Como to HD90 was a race-based decision—Burnam did not wish to return Como to HD90 because its residents were African-American but rather because they were a high turnout area that had been in his district since its creation, had supported him, and wanted to be returned. But the changes to HD90 between Plan H328 and Plan H342 to ensure that its SSVR was above 50% were dictated solely by race. Burnam and Kenney methodically scanned the western border of the district, cutting out majority-Anglo areas precisely because they were Anglo and drawing in majority-Hispanic areas precisely because they were Hispanic. These changes are described in detail above, with both Burnam and Kenney explicitly acknowledging the use of race in their method and Burnam speaking candidly about there being "too many white people" in HD90.

Neither Burnam nor Kenney examined election results while making these changes. Tr671 (Kenney). Furthermore, neither Burnam nor Kenney identified other traditional redistricting criteria that would have justified these changes, and such criteria were subordinated to the goal of increasing SSVR. The amendment contains numerous precinct splits that further this goal and no others. *See* TF-3I (Red375 Report for Plan H358 showing 10 split precincts in HD90). In short, the testimony of both Burnam and Kenney is strong direct evidence that race was the predominate factor motivating the decision of which individuals to place within and without HD90.

The Court next considers whether the changes involved a "significant" number of voters and whether

race predominated as to the district as a whole. *See Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (plaintiff must demonstrate that race was the predominant factor motiving the legislature's decision to place "a significant number of voters within or without a particular district"); *Bethune-Hill v. Virginia State Bd. Of Elections*, 137 S. Ct. 788, 800 (2017) (the ultimate inquiry is the legislature's predominant motive for the design of the district as a whole). In *Bethune-Hill*, the Court noted that

> [t]he ultimate object of the inquiry . . . is the legislature's predominant motive for the design of the district as a whole. A court faced with a racial gerrymandering claim therefore must consider all of the lines of the district at issue; any explanation for a particular portion of the lines, moreover, must take account of the districtwide context. Concentrating on particular portions in isolation may obscure the significance of relevant districtwide evidence, such as stark splits in the racial composition of populations moved into and out of disparate parts of the district, or the use of an express racial target. A holistic analysis is necessary to give that kind of evidence its proper weight.

137 S. Ct. at 800.

In this case, the Burnam amendment did not draw a new district but instead was limited to making changes only along a portion of the district because of Chairman Darby's rules for amendments. Because of these rules, Burnam and his staff could not have made changes to the district as a whole, though they made changes all along

the western border of HD90 where it adjoined HD99. Most of the other borders of the district were altered in 2011 by the racially motivated changes between Plan H113 and Plan H153 to increase the SSVR of 50% as well. *See* docket no. 1364 ¶ 629 (fact finding describing changes made to HD90 to increase the SSVR in 2011). Taken together, the race-based changes between Plan H113 and Plan H358 affect most portions of the district and thus the design of the district as a whole, and the changes unquestionably involve a significant number of voters.

Even accepting Defendant's position that we may consider only the 2013 changes, the Court finds that a significant number of voters were subject to racial classifications and that race predominated as to the district as a whole. It is undisputed that the express racial target of 50.1% SSVR applied to the district as a whole in 2013. And all of the changes made between Plan H328 and Plan H342 were solely motivated by race to achieve that district-wide racial target. We know this ultimately resulted in 7,067 persons being added to HD99 and 7,035 persons being removed from HD90, for a total of 14,102 persons being moved solely as a result of racial gerrymandering.[52] 14,102 is the *minimum* number of voters subjected to racial gerrymandering because that is the number of voters that were ultimately moved. However, the population of the entire border between HD90 and HD99 was considered for movement between

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[52] These numbers are shown in the Red-100 reports for Plan H328 and Plan H342. In Plan H328, the total population of HD90 was 166,719; in Plan H342 it was 159,684. In Plan H328, the total population of HD99 was 163,406; in Plan H342 it was 170,473. HD90 went from .55% underpopulated to 4.74% underpopulated. HD99 went from 2.52% underpopulated to 1.69% overpopulated.

the districts, and an unknown number of persons were *kept in* their respective districts based on their race, and thus also subjected to racial classifications.

The ideal size of a House district is 167,637, making 14,102 about 8.4% of a district's total population. The Court finds that 14,000 voters (8.4% of ideal district population) is a significant number of voters.[53] And because those voters were assigned into and out of HD90 to meet the district-wide racial target, race was the predominant factor in the design of the district as a whole in 2013.

Defendants ground their defense in the idea that Kenney and Burnam's intent cannot be imputed to the legislature. In Defendants' view, "Kenney's actions cannot be attributed to the Legislature as a whole without evidence that members of the Legislature were aware of the manner in which Kenney drafted the amendment." Docket no. 1526 at 89. Even if this is a correct statement of the law, the legislators who voted for Burnam's amendment were aware of how the district was constructed, or at least aware enough that his intent can be imputed to them. As noted above, Rep. Burnam introduced the amendment by noting "it . . . take[s] the African American and Hispanic population out of Representative Geren's district and puts some of my Anglo population into his district." JX-17.3 at S29. Later,

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[53] The Task Force contends that the total population of the precincts split or moved whole because of race by Burnam's amendment is 33,343 individuals, including an estimated 16,429 registered voters. Docket no. 1530 ¶¶ 49, 180, 181. Defendants do not refute this assertion.

Chairman Darby stated that Rep. Burnam's amendment "br[ought] the numbers back over 50%." *Id.*

Those statements are enough, in our view, to let legislators know they were voting for a racial gerrymander. Rep. Burnam's comments are as naked a confession as there can be to moving voters into and out of districts purely on the basis of race, and we cannot say that statements made on the House floor during the consideration of an amendment cannot fairly put legislators on notice of the contents of the amendment. We therefore reject Defendants' lack of intent argument as to the racial gerrymandering claims.

Having found that race predominated, the Court applies strict scrutiny to the use of race in HD90. Under strict scrutiny, the challenged plan is invalid unless the State shows that it is narrowly tailored to achieve a compelling government interest. *Bush v. Vera*, 517 U.S. 952, 959, 976 (1996). For a racial classification to serve a compelling interest, the Legislature must have a strong basis in evidence to support that interest before it implements the classification. *Shaw v. Hunt*, 517 U.S. 899, 910 (1996).

Defendants have articulated no compelling government interest that the use of race may have been serving other than "avoid[ing] a potential VRA problem." Docket no. 1526 at 89.[54] But such a vague goal is not a strong basis in evidence that the VRA required such use of race. Burnam and Chairman Darby apparently believed that HD90 should have an SSVR above 50%, but

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[54] The Court's previous opinion and fact findings on the 2011 changes explain why the race-based changes to HD90 in 2011 were not justified by a compelling state interest.

the evidence shows that no one considered the legal significance of the 50% SSVR target in terms of compliance with the VRA. There is no evidence that any legislator or staffer evaluated racially polarized voting in HD90 or the amendment's effect on Latino voting ability in HD90. Burnam did not consider any changes in election performance or how primary results might change. Tr226 (Burnam). Burnam added that Darby was simply "fixated on the number," meaning the 50% SSVR target. Tr226 (Burnam).

Although Darby explained on the floor that the new plan "brings the numbers back over 50 percent," there was no accompanying explanation for why this could be required. Darby offered no testimony to clarify his remarks at the June 20, 2013 hearing at which the Burnam amendment was adopted. Tr1545 (Darby). Nor did he ever explain the goal of the 50% target or any electoral impact of the amendment to the legislators on the floor.[55] And Darby continually invoked legislative privilege to decline providing any meaningful testimony as to the potential significance of a 50% SSVR threshold or whether he considered any other meaningful election metrics. Tr1545-48, 1550-51 (Darby). As for Kenney, he did not review election data or political data outside of SSVR. Tr645, 671 (Kenney).

In short, there is no evidence showing that the State's use of race in setting and working toward the 50% SSVR target had a strong basis in evidence. Because the use of race in drawing HD90 was not narrowly tailored to

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[55] The Burnam amendment was not introduced in committee; it was first introduced on the floor, and thus was never considered in committee or in a hearing.

achieve a compelling government interest, the Task Force succeeds on its *Shaw* claim in HD90.

The Court's finding that the Legislature violated *Shaw* rests on changes made to HD90 after Como was moved back into HD90, and thus remedying that violation would not necessarily remedy the Task Force's intentional vote dilution claim premised on the initial decision to include Como in HD90. Accordingly, the Court must decide the Task Force Plaintiffs' intentional vote dilution claim as well.

The Court concludes that the Task Force has failed to carry its burden of showing discriminatory intent to minimize, cancel out, or dilute the Latino vote in HD90. Although there was some evidence indicating that Burnam may have been concerned about drawing a Latino challenger in the Democratic primary, the overall evidence persuasively demonstrates that his motive was not to dilute Latino voting strength but to simply return Como to his district. It was a high turnout neighborhood that had been in the district since its creation and had consistently and overwhelmingly supported him throughout his time as HD90's representative.

Likewise, the evidence shows that Como's residents generally valued having Burnam as their representative and were unhappy with the 2011 change that put them in Geren's district. Dorothy DeBose, president of Como's Neighborhood Advisory Council, said in her letter to Burnam and Geren that "[c]oncern or being steamed is a great understatement of how frustrated and perturbed the Lake Como Community is at the idea of being removed from District 90." D-731. She described this move as a "tragedy," highlighting Como's history in HD90 since 1978. D-731. Both Burnam and Geren knew of

Como's desire to be returned to Burnam's district, and Geren agreed to the change. Despite returning Como, Burnam's amendment took steps to maintain the SSVR of HD90 at above 50%, as he had been directed to, but did not attempt to engineer the changes to dilute performance for Latino-preferred candidates in primaries or general elections. Although the SSVR was reduced from Plan H309, Kenney stated that it could not be increased further given the constraints, Tr649-50, and the Court does not find that Kenney or Burnam reduced the SSVR to dilute Latino voting strength.

In short, the return of Como to HD90, rather than being a purposefully discriminatory device meant to minimize, cancel out, or dilute the Latino vote, was simply meant to bring Como back to its long-held place in HD90, where its constituents wanted to be. Burnam's knowledge that the change might also benefit him against a Hispanic primary challenger does not translate to discriminatory motive on these facts. Accordingly, the Task Force's intentional vote dilution claim in HD90 fails because of a lack of a discriminatory intent.

The Court's prior findings that the Legislature intentionally discriminated with regard to HD90 and HD93 in Plan H283 and the Task Force Plaintiffs' success on their HD90 *Shaw*-claim in Plan H358 require a remedy in Tarrant County.

Summary and Conclusion

As explained in the Order on Plan C235, the Legislature in 2013 purposefully maintained the intentional discrimination in Plan H283. Thus, violations found by this Court in its Order on Plan H283 and not sufficiently altered in Plan H358 now require a remedy,

including specifically in Bell County, Dallas County, Nueces County, and Tarrant County. The Court otherwise rejects Plaintiffs' intentional discrimination and § 2 results claims directed against the 2013 enactment except that it finds a § 2 results claim in Nueces County and a *Shaw*-type violation in HD90 in Tarrant County.

In sum, Harris County, Fort Bend County, and Bexar County require no further changes.

MALC lacks standing to pursue its claims in Midland and Ector Counties, and thus no changes are required there.

In Bell County, the intentional discrimination previously found by the Court must be remedied, affecting the configuration of HD54 and HD55.

In Dallas County, the intentional discrimination previously found by the Court must be remedied, affecting the configuration of HD103, HD104, and HD105.

In Nueces County, the intentional discrimination previously found by the Court must be remedied, affecting the configuration of HD32 and HD34. In addition, the Court finds that MALC has proven a § 2 results violation insofar as two compact HCVAP-majority opportunity districts could be drawn within Nueces County, but MALC has not proven that § 2 requires breaking the County Line Rule to draw such districts.

In Tarrant County, the intentional discrimination previously found by the Court must be remedied, affecting HD90 and HD93. In addition, although the Court rejects the Task Force's intentional vote dilution claim in HD90, the Court finds that the Task Force established its *Shaw*-type racial gerrymandering claim for the district. That violation also requires a remedy.

It is therefore ORDERED that the Office of the Attorney General file a written advisory within three business days stating whether the Legislature intends to take up redistricting in an effort to cure these violations and, if so, when the matter will be considered.

If the Legislature does not intend to take up redistricting, the Court will hold a hearing to consider remedial plans beginning on **September 6, 2017 at 8:30 a.m.** in Courtroom 1. In preparation for the hearing, the parties must take immediate steps to consult with their experts and mapdrawers and prepare statewide plans that remedy the violations listed above.

The parties must confer and address objections and concerns, to the extent possible, prior to the hearing. If both sides agree upon a remedial plan, they should notify the Court, but the hearing will nevertheless proceed so the parties can present the plan on the record. If the parties cannot agree, they should be prepared to offer, support, and defend their proposed remedial plan(s) at the hearing. Plaintiffs and Defendants will be permitted to offer up to four alternative remedial plans per side, and Plaintiffs may (but are not required) to jointly offer plan(s).

The parties should consult with Texas Legislative Council, to the extent necessary, to upload their proposed remedial plans into DistrictViewer and ensure that all relevant data is available to all parties and the Court. If the parties intend to rely on data or analysis that is not available through TLC, they must provide that data to all other parties as soon as that data is available.

It is further ORDERED that Texas Legislative Council staff be present at the remedial hearing for technical assistance in the parties' presentation of their

proposed plans through DistrictViewer or other available means.

SIGNED this 24th day of August, 2017,

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
on behalf of the panel

APPENDIX C

In the United States District Court
for the
Western District of Texas

SHANNON PEREZ, ET AL.,	§	
	§	
v.	§	SA-11-CV-360
	§	
GREG ABBOTT, ET AL.	§	

ORDER ON PLAN H283

Before Circuit Judge SMITH, Chief District Judge GARCIA, and District Judge RODRIGUEZ

Circuit Judge Smith, dissenting

XAVIER RODRIGUEZ, District Judge and ORLANDO L. GARCIA, District Judge:

This Order addresses Plaintiffs' claims concerning Plan H283, enacted by the 82nd Legislature in 2011. Plaintiffs assert "results" claims under § 2 of the Voting Rights Act ("VRA"), intentional vote dilution claims under § 2 of the VRA and the Fourteenth Amendment, and *Shaw*-type racial gerrymandering claims under the Equal Protection Clause of the Fourteenth Amendment. The Perez, LULAC, and MALC Plaintiffs also assert one person, one vote claims under the Equal Protection Clause of the Fourteenth Amendment based on population deviations among the districts. This opinion is intended to be read in conjunction with the Court's fact

findings, which are issued separately, as well as the Court's opinion on Plan C185 (docket no. 1339).

I. VRA § 2 results claims generally

The Task Force, NAACP Plaintiffs, and MALC[1] assert § 2 results claims on the basis that Texas could have enacted a plan with more minority opportunity districts (both single-minority and coalition) than were contained in Plan H283 and that enacting a plan with such additional districts was required by the § 2 results test. In their Fourth Amended Complaint, the Task Force Plaintiffs allege that "Plan H283 fails to create at least three additional Latino-majority House districts that afford Latinos the opportunity to elect their preferred candidate." Docket no. 891 ¶ 37; *see also id.* ¶ 68 ("The Latino population of Texas is sufficiently geographically compact to comprise the majority of citizen voting age persons in at least 33 Texas House districts."). They also assert so-called "nudge factor" claims against two HCVAP-majority districts in Plan H283, HD117 in Bexar County and HD78 in El Paso. Docket no. 1282 at 4-5.

The Task Force Plaintiffs contend that "Latinos are sufficiently numerous and compact to comprise the citizen voting age majority in more districts than contained in Plan H283, including in Harris County, Nueces County, and the Rio Grande Valley." Docket no. 1282 at 4. However, somewhat inconsistently, they offer Plan H292 as a demonstration plan, asserting that it has 34 Latino opportunity districts, created by restoring HD33 in

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[1] The United States asserts only intentional vote dilution claims under § 2, and does not pursue any § 2 results claims. As discussed below, the Court finds that the Perez Plaintiffs are not asserting § 2 results claims, though the pleadings are not entirely clear.

Nueces County, "balancing" the Latino population in Bexar County to restore HD117, "balancing" the Latino population in El Paso to add HD78, and adding a Latino opportunity district in the Rio Grande Valley by combining population overages from Cameron and Hidalgo Counties to capture the "organic" district that grew in the Valley. Docket no. 1282 at 6; docket no. 444 at 20.[2] Defendants correctly note that "only 32 districts exceed 50% HCVAP or SSVR" in Plan H292. Docket no. 468 at 19.

The NAACP's Third Amended Complaint alleges that the Texas Legislative Black Caucus introduced a plan with four additional African-American opportunity districts (Plan H202), and alleges a § 2 results claim. Docket no. 900 ¶¶ 22, 58; *see also* docket no. 406 at 30 (arguing that four additional minority opportunity districts could have been drawn compared to the enacted plan).[3]

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[2] The Task Force also points to this Court's interim plan, Plan H309, arguing that it has 34 Latino opportunity districts (including HD35 in the Valley, HD78 in El Paso, HD117 in Bexar County, and HD144 in Harris County). Docket no. 1282 at 8. However, this Court did not reach the merits of the § 2 claims when fashioning the interim map, and did not make findings that any districts were required by § 2. Therefore, Plan H309 is not a valid demonstration map absent further evidence supporting the *Gingles* factors.

[3] The Court notes that the NAACP Plaintiffs have not been consistent in their assertions concerning which districts they propose as additional minority districts in their demonstration plan, Plan H202. In their Third Amended Complaint, they note that the Texas Legislative Black Caucus tendered Plan H202 during the session and that "[t]he new districts created by the Legislative Black Caucus were State House District 26 in Fort Bend and Harris County, State House District 54 in Bell County, State House District 107 in Dallas County, and State House District 114 in Tarrant County." Docket no.

MALC also asserts § 2 results claims and contends that up to six additional minority opportunity districts were required. Docket no. 897 ¶¶ 74-75; docket no. 412 at 16-18. MALC has offered numerous demonstration maps, including statewide Plans H201, H205, H295, and H329, and various limited plans for certain geographic areas.

"When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994). Generally, to evaluate this claim, it must be determined how many "reasonably compact districts with a sufficiently large minority population to elect candidates of its choice" exist in Plan H283, and whether Plaintiffs have demonstrated that more were required, which is usually done through presentation of demonstration plans. *LULAC v. Perry*, 548 U.S. 399, 430 (2006) ("*De*

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900 at ¶ 22. In their 2011 Trial Brief, they asserted that Plan H202 had four new minority opportunity districts—HD72 in Hidalgo County as a Latino opportunity district; HD107 in Dallas County as a coalition district; HD114 in southeast Tarrant County as a coalition district; and HD132 in west Harris County as a coalition district. Docket no. 288 at 10; *see also* Tr813-14 (Turner) (discussing HD114). In their 2011 and 2014 Post-Trial Briefs and proposed Findings of Fact, the NAACP Plaintiffs focus only on HD26 in Fort Bend County, HD54 in Bell County, HD107 in Dallas County, and HD149 in Harris County as their proposed additional four districts. Docket nos. 406 at 30, 408 FF31-45, 1280 at 31-39, & 1281 FF121-134, 146-167. The Court will therefore likewise focus on these four districts. Further, although the NAACP Plaintiffs supported Plan H214 as an interim plan, *see* docket no. 441, they do not brief it as a demonstration *Gingles* plan, and thus the Court does not consider it.

Grandy requires a comparison between a challenger's proposal and the 'existing number of reasonably compact districts.'"). Because Plaintiffs are alleging § 2 claims based on the number of opportunity districts statewide, analysis of the claims should involve a comparison between the number of opportunity districts in the enacted plan (Plan H283) and a *Gingles* demonstration plan proposed by Plaintiffs. While normally this would be a straightforward task, it is not in this case.

This task is made complicated by numerous factors, including that: (1) it remains unclear whether the Perez Plaintiffs are asserting § 2 results claims despite offering statewide demonstration Plan H232 and several limited-area demonstration plans[4]; (2) the parties (including the Plaintiffs among themselves) disagree concerning which districts in the enacted plan are opportunity districts; (3) even single Plaintiffs present conflicting assertions concerning which districts they are alleging to be additional opportunity districts; (4) some Plaintiffs fail to clearly set out specifically all the districts they contend are opportunity districts either in the enacted plan or their demonstration plan (or both), asserting only that

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[4] The Perez Plaintiffs' Sixth Amended Complaint (docket no. 960) is somewhat ambiguous concerning whether they assert § 2 results claims against Plan H283 or only intentional vote dilution claims. Although during this litigation they offered demonstration Plan H232, a plan offered by Rep. Coleman during the legislative session, they do not provide any briefing relevant to § 2 results claims. Further, their Complaint speaks only in terms of intentional discrimination and intentional vote dilution. Accordingly, the Court will treat the Perez Plaintiffs as not bringing any § 2 results claims, and will review their claims only as part of the intentional vote dilution claims analysis. Demonstration plans are relevant to determining dilutive effects for intentional vote dilution claims.

more could have been drawn; (5) Plaintiffs and Defendants disagree on how to determine whether a district is a minority opportunity district and both incorrectly assert that districts with less than 50% minority CVAP are opportunity districts in some instances; (6) many of Plaintiffs' experts reports and analyses focus on VAP instead of CVAP; and (7) certain demonstration plans contain 25 districts in Harris County, compared to 24 in Plan H283, making comparisons outside of drop-in counties more difficult.[5]

The Court finds that certain of the § 2 results claims are moot, given the Legislature's adoption of the interim plan, with slight modifications, in 2013. Plan H309 and Plan H358 resolved some of the § 2 results claims, and no § 3(c) relief would be available based on any proven violations of the § 2 results claims. Given these facts, as well as the complicating factors listed above, the Court concludes that it would be a waste of the Court's resources to delve into significant detail into all of the § 2 results claims with regard to Plan H283. Instead, because the Legislature adopted a new plan in 2013, the parties will be permitted to bring their § 2 results claims concerning the 2013 plan based on more recent ACS data. However, the

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[5] As will be discussed, the Court concludes that because the 2013 adopted plan currently in effect has 24 districts yet includes the additional opportunity districts Plaintiffs contend are required, results claims relying on a 25-district map for Harris County are moot. Because HD149 could be maintained and an additional opportunity district could be drawn in Harris County with 24 districts, the Court finds that the 24-district plans are appropriate demonstration plans for the results claims, while the 25-district plans are not appropriate demonstration plans outside of the drop-in counties because the number of rural counties differs from Plan H283.

Court will offer some analysis of the 2011 plan § 2 results claims to give preliminary guidance to the parties for the 2013 plan trial and as necessary where the claims relate to the Plaintiffs' intentional vote dilution claims.

A. How to measure opportunity districts

For both the enacted plan and Plaintiffs' demonstration districts, Defendants contend that opportunity districts are measured solely on demographics. For the enacted plan, Plaintiffs contend that they are determined by demographics coupled with a functional analysis including election analysis. Some Plaintiffs (such as the Task Force Plaintiffs) also apply a functional analysis to their proposed demonstration districts, though some Plaintiffs (MALC and the NAACP) appear to rely more on meeting the demographic threshold for demonstration districts.[6]

Some Plaintiffs challenge specific majority-HCVAP districts as not providing real electoral opportunity and not being Latino opportunity districts—specifically, the Task Force Plaintiffs challenge HD78 in El Paso and HD117 in Bexar County under § 2 for both results and intent, and the United States contends that HD35 and HD41 are not opportunity districts as part of its

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[6] For example, the Task Force uses Dr. Engstrom's election index (with the criteria of 50% wins) to determine whether a district, either in the enacted plan or their proposed plan, is an opportunity district. Using this metric, the Task Force includes some districts as "Latino opportunity districts" in Plan H292 that do not meet the demographic majority-HCVAP threshold. MALC, on the other hand, appears to focus more on reaching the majority-HCVAP threshold to classify districts in its proposed plans as opportunity districts, although it generally also offered some evidence to support a finding that such districts could perform for Latinos.

intentional vote dilution claims.[7] As this Court held in its congressional plan opinion, Plaintiffs may bring results claims against a particular district despite its majority-HCVAP status; the fact that a district is majority-HCVAP does not, standing alone, qualify it as a Latino opportunity district, and Plaintiffs may attempt to prove that it lacks "real electoral opportunity." Similarly, as discussed in the congressional plan opinion, the Court views exogenous election indices in enacted districts as probative evidence of whether a district is an opportunity district, but declines to measure whether a district is an opportunity district based solely on a 50% win standard on such indices. Rather, the Court conducts a practical, searching inquiry based on the totality of circumstances and the particular facts of the case to determine whether any particular district is an opportunity district for § 2 purposes.

In their 2011 proposed Fact Findings and Conclusions of Law, Defendants assert that Plan H283 contains 30 Latino opportunity districts and 12 African-American opportunity districts. Docket no. 413 FF93, 94. Defendants' count of Latino opportunity districts is based

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[7] The United States' Complaint in Intervention alleges that Plan H283 reduced the number of minority ability to elect districts (a § 5 standard) from 50 in the benchmark to 45. Docket no. 907 ¶ 50. Its post-trial briefing refers to a reduction in the number of minority opportunity districts (the § 2 standard) from 50 to 45 or 46; it views the status of HD41 as unclear due to the number of precinct splits in the district. See, e.g., docket no. 1279 at 36. The United States challenges HD35, HD41, and HD117 as no longer being ability to elect or opportunity districts. Docket no. 907, docket no. 1279. The Court notes that the United States' expert Lisa Handley used the terms "ability to elect" and "opportunity to elect" interchangeably and applied the same standard to both. TrA599 (Handley).

solely on the number of districts with 50% or more HCVAP from the Red-106 Report. Docket no. 413 FF93.[8] As discussed, a 50% HCVAP district is theoretically an opportunity district, but it may still be challenged by Plaintiffs as not providing real electoral opportunity.

Although Defendants' fact findings also cite the Red-106 report (the ACS Special Tabulation of CVAP) as support for the number of African-American opportunity districts, the Appendix to the post-trial brief states that Defendants' criterion for African-American opportunity districts is 40% BVAP. Docket no. 411 Appendix at Table 5 n.1.[9] Using the 40% BVAP criteria, Defendants list the following as "African-American districts": HD22, HD27, HD95, HD100, HD109, HD110, HD111, HD131, HD139, HD141, HD142, and HD146.[10] Docket no. 411 Appendix. Defendants claim that no proposed map creates more African-American districts using the 40% BVAP criterion. Defendants' use of 40% BVAP appears to be based on the position taken by mapdrawers and

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[8] Although Defendants rely on 50% HCVAP in their briefing, it is clear that Interiano, the primary mapdrawer of the House plan, and other redistricters used a 50% SSVR standard for Latino opportunity districts when drawing the House plan. This was partly due to the fact that HCVAP data was not available when they initially began drawing districts (though it was available before the plan went to the floor) and the fact that SSVR data was available in RedAppl.

[9] That Defendants use 40% BVAP as the measure for African-American opportunity districts is confirmed by their proposed fact findings filed during the interim plan proceedings. *See* docket no. 627 FF135.

[10] All of these districts are also above 40% BCVAP, but three (HD27, HD95, and HD100) are below 50% BCVAP, although HD95 is within the margin of error. In addition, HD147 has a BCVAP of 47.4% but its BVAP is only 38.2%, so Defendants did not include it as an "African-American district."

redistricters, despite the fact that Defendants agree that Supreme Court case law has established a majority (over 50%) requirement for minority opportunity districts under § 2. The Court thus finds Defendants' reliance on a 40% BVAP threshold for African-American opportunity districts to be erroneous.[11] Rather, for single-minority opportunity districts, the standard for a minority opportunity district is majority CVAP for the particular minority group.

B. Whether § 2 can require coalition districts

Defendants further contend that minority coalition districts are never required or protected by § 2, and thus they do not count them in any of their analyses. However, Plaintiffs assert that coalition districts can be required and propose certain coalition districts in their *Gingles* demonstration plans. The Court agrees with Plaintiffs that § 2 can require the creation of minority coalition districts.

The Court in *Gingles* "ha[d] no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 46 n.12 (1986). Several cases presented this issue after *Gingles*, but the Supreme Court declined to address the issue and resolved the cases on other grounds.

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[11] Although it may be true that 40% BVAP districts usually perform for African-American voters, this has to do with the composition of the rest of the district's population. Usually such districts are in mixed-race areas, where significant Hispanic population contributes to the performance for African-American voters. But the 40% BVAP criterion, standing alone, cannot make the district an African-American opportunity district.

In *Growe v. Emison*, 507 U.S. 25 (1993), the district in question was composed of minority voters from three different minority groups, including Native Americans. The Supreme Court noted that "*Gingles* expressly declined to resolve whether, when a plaintiff alleges that a voting practice or procedure impairs a minority's ability to influence, rather than alter, election results, a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice. We do not reach that question in the present case either." *Id.* at 41 n.5 (citations omittted). Again, in *Johnson v. De Grandy*, 512 U.S. 997, 1009 (1994), the Supreme Court stated, "As in the past, we will assume without deciding that even if Hispanics are not an absolute majority of the relevant population in the additional districts, the first *Gingles* condition has been satisfied in these cases."

In *LULAC v. Perry*, 548 U.S. 399, 443 (2006), the Court, as it had "done several times before," assumed without deciding "that it is possible to state a § 2 claim for a racial group that makes up less than 50% of the population." *Id.* at 443 (Kennedy, J., writing for a plurality). However, Justice Souter opined that it was time to recognize that "the integrity of the minority voting population in a coalition district should be protected much as a majority-minority bloc would be." *Id.* at 485 (Souter, J., concurring in part and dissenting in part).

The Supreme Court did address the issue of crossover districts in *Bartlett v. Strickland*, 556 U.S. 1 (2009) (plurality opinion). In *Strickland*, state house district 18 had been majority minority, but the African American voting age population had fallen below 50%, and it was no longer possible to draw a geographically compact majority-minority district. *Id.* at 8. The North Carolina

legislature split a county in an effort to give "African-American voters the potential to join with majority voters to elect the minority group's candidate of choice." *Id.* Thus, the following question was posed to the Court: "In a district that is not a majority-minority district, if a racial minority could elect its candidate of choice with support from crossover majority voters, can § 2 require the district to be drawn to accommodate this potential?" *Id.* at 6. Justice Kennedy acknowledged that it had "declined to decide the minimum size minority group necessary to satisfy the first [*Gingles*] requirement . . . [but] [w]e must consider the minimum-size question in this case." *Id.* at 12 (Kennedy, J.). The plurality made clear at the outset that it was only addressing the issue as it pertains to crossover districts; it was not addressing coalition districts. As Justice Kennedy explained:

> In majority-minority districts, a minority group composes a numerical, working majority of the voting-age population. Under present doctrine, § 2 can require the creation of these districts. At the other end of the spectrum are influence districts, in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected. This Court has held that § 2 does not require the creation of influence districts.
>
> The present case involves an intermediate type of district—a so-called crossover district. Like an influence district, a crossover district is one in which minority voters make up less than a majority of the voting-age population. But in a crossover district, the minority population, at least potetially, is large enough to elect the candidate of its choice with help from voters who are members of the

> majority and who cross over to support the minority's preferred candidate. This Court has referred sometimes to crossover districts as "coalitional" districts, in recognition of the necessary coalition between minority and crossover majority voters. But that term risks confusion with coalition-district claims in which two minority groups form a coalition to elect the candidate of the coalition's choice. We do not address that type of coalition district here.

Id. at 13-14 (citations omitted).

After considering the parties' arguments, the Court held that crossover districts are not protected under § 2. *Id.* at 14-15. However, the scope of the ruling was clarified in several ways. First, the ruling did not apply to coalition districts, as the Court was not addressing that issue. *Id.* at 13-14. The Court also made clear that "[o]ur holding does not apply to cases in which there is intentional discrimination against a racial minority," and "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Id.* at 20, 24. The Court stated, "Our holding that § 2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion." *Id.* at 23. While legislatures have a choice to draw such districts, § 2 "does not mandate creating or preserving crossover districts." *Id.*

Although the *Strickland* decision may provide some guidance on crossover districts, the Supreme Court has not yet addressed coalition districts—those electoral districts in which two or more minority groups form a

coalition to elect the candidate of their choice. While each minority group individually may not be able to meet the first *Gingles* precondition, they may be able to meet the criteria when combined as a coalition. Coalition districts are different from crossover districts, in which minorities require the help of white crossover voters to elect their candidate of choice. Minority voters in coalition districts do not rely on white crossover votes in order to elect the minorities' candidate of choice.

Again, the Court in *Strickland* clearly stated that it was not addressing coalition districts. *Id.* at 13-14. The Court very carefully distinguished crossover and coalition districts and cautioned against confusing the two. *Id.* at 13. However, the Court's later decision in *Perry v. Perez*, 565 U.S. 388 (2012) (per curiam) may have created some of the confusion that the Court cautioned against in *Strickland*. In referring to a new congressional district in this Court's interim redistricting plan, the Court in *Perez* stated, "If the District Court did set out to create a minority coalition district, rather than drawing a district that simply reflected population growth, it had no basis for doing so. *Cf. Bartlett v. Strickland*, 556 U.S. 1, 13-15, 129 S. Ct. 1231, 173 L.Ed.2d 173 (2009)(plurality opinion)." 565 U.S. at 399. The meaning of this statement, the use of the "*Cf.*" signal, and the reliance on *Strickland* is unclear, given that *Strickland* did not address coalition districts. If the Court meant that there was no factual basis for drawing the district, there would be no need for a citation in support. If the Court meant that there was no legal basis for drawing the district, *Strickland* provides no support because the opinion expressly states that it does not apply to coalition districts. In any event, the Court's statement in *Perez* provides no guidance on the

issue of whether the majority-minority requirement under the first *Gingles* precondition mandates that a single racial or ethnic group (*e.g.*, Hispanic or African American, but not a combination of both) constitute a majority of the citizen voting age population or whether the first *Gingles* precondition may be satisfied when minorities from more than one racial or ethnic group, when joined together, constitute a majority of the citizen voting age population.

The Fifth Circuit addressed this issue more than twenty-five years ago and recognized that minority groups may be aggregated to meet the first *Gingles* precondition. In *LULAC v. Midland ISD*, 812 F.2d 1494, 1500 (5th Cir.), *vacated on state law grounds*, 829 F.2d 546 (5th Cir. 1987), the Fifth Circuit approved of the manner in which African Americans and Hispanics were joined together as a compact minority group "capable of carrying a district." The Fifth Circuit reached the same result one year later in *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988)). In *Campos*, the district court found that a minority group composed of both African Americans and Hispanics was sufficiently large and geographically insular to form a majority in a single-member district. The district court also found that "Blacks were cohesive, Hispanics were cohesive, together the minority group was cohesive, and that Anglos voted sufficiently as a bloc to usually defeat the minority's preferred candidate." *Id.* at 1242. The district court reviewed the totality of the circumstances, considering the relevant factors, and concluded that vote dilution had occurred and a violation of § 2 had been established. *Id.* On appeal, the Fifth Circuit found that the district court's

finding that the first *Gingles* requirement was satisfied was not clearly erroneous, and explained:

> There is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics. Section 1973(a) protects the right to vote of both racial and language minorities. . . . If, together, they are of such numbers residing geographically so as to constitute a majority in a single member district, they cross the *Gingles* threshold as potentially disadvantaged voters.

Id. at 1244 (citations omitted). The Court in *Campos* also explained, however, that the plaintiffs must prove that the minorities "actually vote together" in a cohesive manner; otherwise, their claim will fail. "The key is the minority group as a whole. . . . If the evidence were to show that the Blacks vote against a Hispanic candidate, or vice versa, then the minority group could not be said to be cohesive. But if the statistical evidence is that Blacks and Hispanics together vote for the Black or Hispanic candidate, then cohesion is shown." *Id.* at 1245. Because the Campos plaintiffs showed that African Americans and Hispanics, as a minority group, were politically cohesive, the district court's findings on the second *Gingles* factor was not clearly erroneous. *Id.* at 1248.

The Eleventh Circuit agreed with the Fifth Circuit's view on coalition districts in *Concerned Citizens of Hardee County v. Hardee County Board of Commissioners*, 906 F.2d 524, 526 (11th Cir. 1990), stating that "[t]wo minority groups (in this case blacks and hispanics) may be a single section 2 minority if they can establish that they behave in a politically cohesive

manner." The plaintiffs failed to prove, however, that Black and Hispanic voters in Hardee County were politically cohesive. *Id.* at 526-27. In *Badillo v. City of Stockton*, 956 F.2d 884, 886 (9th Cir. 1992), the Ninth Circuit assumed that a combined group of Black and Hispanic voters met the first *Gingles* precondition, but held that the minority plaintiffs failed to show political cohesion as required under the second *Gingles* requirement. In *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271 (2nd Cir.), *vacated on other grounds*, 512 U.S. 1283 (1994), the Second Circuit also assumed that coalition districts are covered under § 2. The district court found that "[c]ombining minority groups to form [majority-minority] districts is a valid means of complying with § 2 if the combination is shown to be politically cohesive." 26 F.3d at 275. The circuit court agreed that the first *Gingles* precondition had been met, and found "both testimonial and statistical evidence that African Americans and Hispanics in Bridgeport [were] politically cohesive and that voting in the City [was] remarkably racially polarized." *Id.* at 275-76.

In *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc), the Sixth Circuit expressly disagreed with the Fifth Circuit on the issue of coalition districts, thus creating a clear split among the circuit courts. The redistricting plan in *Nixon* included a district with both African-American and Hispanic voters in order to establish sufficient numbers and satisfactory geographical compactness. *Id.* at 1384. The district court granted the defendants' motion to certify the question of whether two protected minority groups may aggregate to pursue a § 2 vote dilution cause of action. *Id.* at 1383. The

circuit court decided that if Congress had wanted to protect a minority group that was composed of more than one race or ethnicity, it would have used more words in the plural form, such as "protected classes" rather than "protected class." *Id.* at 1386-87. Thus, it refused to extend § 2 coverage to a minority group that includes more than one race or ethnicity.

In 2012, the Second Circuit noted that "[t]he circuits are split as to whether different minority groups may be aggregated to establish a Section 2 claim." *Pope v. Cty. of Albany*, 687 F.3d 565, 572 n.5 (2d Cir. 2012). The court ultimately resolved the case on the failure to show racially polarized voting but discussed the first *Gingles* precondition at length and noted that while plaintiffs may choose a more expansive minority group to satisfy the first *Gingles* requirement, it may also add to their burden in demonstrating political cohesion required for the second precondition. *Id.* at 574-77 & n.11.

To summarize, the Supreme Court has not addressed coalition districts, the Fifth Circuit has expressly permitted them, and the Second, Ninth, and Eleventh Circuits have tacitly recognized them. Only the Sixth Circuit has expressly denied § 2 protection to a combined group of minorities under the first *Gingles* requirement. As the Fifth Circuit has stated, "We are a strict *stare decisis* court." *Ballew v. Continental Airlines, Inc.*, 668 F.3d 777, 782 (5th Cir. 2012). Just as one panel of the circuit court "may not overrule the decision, right or wrong, of a prior panel in the absence of any intervening contrary or superseding decision by the court en banc or the Supreme Court," a district court is bound by a circuit decision unless or until it is overturned by an en banc decision of the circuit court or a decision of the Supreme

Court. *See Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1211 (5th Cir. 1991). In the Fifth Circuit, *Campos* is binding precedent, and this Court must follow it in the absence of any authority to the contrary. Thus, if Plaintiffs can meet their burden of proof in all other respects, their § 2 claim will not fail simply because the minority group in question is composed of more than one race or ethnicity.

This is consistent with the manner in which the Supreme Court has dealt with earlier cases, in which it assumed (without deciding) that it was permissible for the district court to combine distinct ethnic and language minority groups for purposes of assessing compliance with § 2. *See, e.g., Growe*, 507 U.S. at 41 (unanimous opinion). Rather than impose a strict prohibition, the Supreme Court simply cautioned that "when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential." *Id.* (citing *Badillo v. Stockton*, 956 F.2d 884, 891 (9th Cir. 1992); *Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs*, 906 F.2d 524 (11th Cir. 1990); *Campos*, 840 F.2d at 1244).

This is also consistent with the intent of Congress when it amended the Act in 1982. In amending § 2, Congress emphasized the need for courts to undertake a searching practical evaluation of the "past and present reality." S. Rep. 97-417 at *30 (citing *White v. Regester*, 412 U.S. 755, 760-77 (1973)). Coalitions of minority voters are a present reality, and affording them protection under § 2 is consistent with the Congressional goal of keeping political processes "equally open to minority voters." S. Rep. 97-417 at *2. Minorities must still "pull, haul, and

trade to find common political ground," *De Grandy*, 512 U.S. at 1020, and they will not meet the second *Gingles* precondition if they do not. But once that has been achieved and the minority voters, when combined, constitute a majority, the first *Gingles* precondition is also satisfied. The bottom line is that every case is different, and "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Voinovich v. Quilter*, 507 U.S. 156, 158 (1993). Thus, this Court follows the Fifth Circuit and holds that § 2 can require the creation of coalition districts, provided that the *Gingles* criteria (and totality of the circumstances) are satisfied as to the coalition.

C. Whether the VRA can require the State to violate the County Line Rule[12]

It is undisputed that mapdrawers did not create certain opportunity districts even though the proposed districts met their population thresholds because they felt that doing so would have required a County Line Rule violation. In their briefing, Defendants argue that requiring the Legislature to violate the County Line Rule to comply with § 2 would violate the Equal Protection

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[12] The Texas County Line Rule is contained in Article III, § 26 of the Texas Constitution and provides that "whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties."

Clause and the *Shaw v. Reno* line of cases because they would be subordinating traditional redistricting principles to race. Docket no. 1295 at 54-55; docket no. 996 (Motion for Summary Judgment) at 28-31. The Court disagrees.

The Supremacy Clause generally requires that state laws that are inconsistent with federal laws must yield to the federal law. As a result, it is well established that state constitutional principles such as the County Line Rule must yield to the Equal Protection Clause's one-person, one-vote requirement. *Bartlett v. Strickland*, 556 U.S. 1, 6 (2009) ("It is common ground that state election-law requirements like the Whole County Provision may be superseded by federal law—for instance, the one-person, one-vote principle of the Equal Protection Clause of the United States Constitution."). Mapdrawers recognized this requirement by splitting one county in the map to maintain an overall deviation below 10%, but they asserted that this was the only county cut permitted by law. And although the TLC had advised that the County Line Rule would also have to yield to the VRA and Texas had itself taken this position in prior redistricting litigation,[13] redistricting leadership flatly rejected that position.

In *Strickland*, the Supreme Court considered the question "whether § 2 of the Voting Rights Act requires district lines to be drawn that otherwise would violate the

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[13] *See, e.g.*, D-124 (Hanna's County Line Rule presentation advising that the County Line Rule would have to yield to the VRA); D-128 at 142 (Hanna's guidance book on redistricting for the Legislature, noting that the State argued in *Clements v. Valles* that it was required to violate the County Line Rule to comply with the VRA); *Clements v. Valles*, 620 S.W.2d 112 (Tex. 1981).

Whole County Provision" in North Carolina's Constitution. 556 U.S. at 7. The Court then stated, "That, in turn, depends on how the statute is interpreted." *Id.* The Court noted that § 2 "can require the creation of [majority-minority] districts" but concluded that the VRA did not require the particular district at issue to be drawn because the plaintiffs had failed to establish the first *Gingles* precondition under the Court's newly established majority standard. *Id.* at 13-15. Thus, because the district was not required by § 2 in that case, the Supreme Court did not directly decide the initial issue of whether § 2, when satisfied, could have required the state to draw a district in violation of the Whole County Provision. Nevertheless, such a conclusion is implied, given that the Court could simply have held that § 2 could not require any district to be drawn in contravention of the Whole County Provision, regardless of how the statute is interpreted and regardless of whether § 2 requirements were satisfied, rather than determining whether § 2 required the district in the first instance.

Nevertheless, Defendants argue that the "Legislature's adherence to the Texas Constitution was not only a rational exercise of race-neutral policy; it was essential to avoid a violation of the Equal Protection Clause" and that Plaintiffs' "suggesting that the [VRA] compels subordination of traditional redistricting principles to race, would simply redirect the strict scrutiny analysis to section 2 itself." Docket no. 411 at 38-39. Defendants contend that Supreme Court jurisprudence holds "beyond question that traditional redistricting principles cannot be subordinated to race without running afoul of the Fourteenth Amendment." *Id.*

at 39-40. However, the Supreme Court's Equal Protection cases debunk this argument.

Justice O'Connor, writing for a plurality, held that, assuming compliance with § 2's results test is a compelling state interest (this Court holds that it is), the "narrow tailoring" requirement of strict scrutiny allows states a limited degree of leeway in furthering such interests—"[i]f the State has a 'strong basis in evidence' for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2, and the districting that is based on race 'substantially addresses the § 2 violation,' it satisfies strict scrutiny," meaning that it operates as a defense to a charge of racial gerrymandering. *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion). Further, the plurality noted, the "district drawn in order to satisfy § 2 must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid § 2 liability." *Id.* at 979. On its face, this language makes clear that traditional districting principles may be subordinated to race when necessary to avoid § 2 liability (but no more than necessary).

Similarly, the Fifth Circuit has held that a majority-minority district "is constitutional if the State has a 'strong basis in evidence' for concluding that the three *Gingles* preconditions are present and if the district drawn in order to satisfy § 2 does not 'subordinate traditional districting principles to race substantially more than is "reasonably necessary" to avoid § 2 liability.'" *Clark v. Calhoun Cty., Miss.*, 88 F.3d 1393, 1407 (5th Cir. 1996); *see also id.* at 1406 ("a tailored response to a found [§ 2] violation must use race at the expense of traditional political concerns no more than is reasonably

necessary to remedy the wrong"). Thus, traditional districting principles such as the County Line Rule may be subordinated to race to remedy a § 2 violation, so long as it is no more than reasonably necessary to comply with § 2.[14] *Cf. Bethune-Hill v. Va. State Bd. of Elections*, 137 S.

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[14] There are also other cases in which the Supreme Court and Fifth Circuit have recognized that the County Line Rule (and similar rules from other states) must yield to the VRA. *See Bartlett v. Stephenson*, 535 U.S. 1301, 1302-04 (Rehnquist, C.J.) (denying North Carolina's application for a stay of a state supreme court order that required, in part, "the new plan 'must preserve county lines to the maximum extent possible, except to the extent counties must be divided . . . to comply with Section 2 of the Voting Rights Act'"); *LULAC v. Clements*, 884 F.2d 185, 188 (5th Cir. 1989) (finding that a county could not intervene in redistricting litigation for the purpose of "objecting to the proposed reduction of the district size in violation of Texas law" because "[i]f the present district lines are found to violate the Voting Rights Act and/or the United States Constitution, Texas' constitutional and statutory provisions protecting district lines will be nullified under the Supremacy Clause").

In addition, numerous courts have recognized the broader possibility that state election laws of any sort should yield to the VRA by operation of the Supremacy Clause. *See Abrams v. Johnson*, 521 U.S. 74, 79 (1997) ("When faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying the existing plan, *to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.*" (emphasis added)); *Katzenbach v. Morgan*, 384 U.S. 641, 646-47 (1966) ("We hold that . . . by force of the Supremacy Clause, Article VI, the New York English literacy requirement [as a precondition to the right to vote] cannot be enforced to the extent that it is inconsistent with § 4(e) [of the VRA]."); *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993) (noting a plan's drafter's "disregard[ing] the requirements of the Ohio Constitution where he believed that the [VRA] required a contrary result" demonstrated his "obedience to the Supremacy Clause"); *State of S.C. v. Katzenbach*, 383 U.S. 301, 333–34 (1966), *abrogated by Shelby Cty., Ala. v. Holder*, 133 S. Ct.

Ct. 788 (2017) (affirming district court's finding that although race predominated in the drawing of District 75, the district survived strict scrutiny because the legislature's use of race was narrowly tailored to complying with § 5 of the VRA).

Defendants' position conflates the two steps of a *Shaw*-type Equal Protection analysis. When a party asserts a claim under *Shaw* that a districter has racially gerrymandered a district, the first inquiry is whether traditional redistricting principles are subordinated to race such that racial criteria predominated; if so, strict scrutiny is triggered. In Defendants' view, the first step would be the end of the inquiry. However, as discussed above, strict scrutiny allows the use of race when narrowly tailored to further a compelling state interest, such as complying with the VRA. Accordingly, strict scrutiny permits the subordination of traditional redistricting principles to race insofar as reasonably necessary to avoid § 2 liability and/or remedy the wrong.

2612 (2013) (recognizing that the VRA could remedy a state constitution's violation of the Fifteenth Amendment, such as improperly used literacy tests); *Lopez v. Monterey Cty., Cal.*, 871 F. Supp. 1254, 1258 (N.D. Cal. 1994) ("Under the Supremacy Clause, the implementation of relief for a violation of the Voting Rights Act must take precedence over enforcement of state law that stands in the way of effective relief.") (quoting *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978)); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1047 n.21 (D. Md. 1994) ("Plaintiffs are correct in arguing that state statutes or constitutional provisions that result in violations of the U.S. Constitution or the Voting Rights Act are preempted by federal law. On the other hand, it is self-evident that a state plan should—indeed must—comply with state statutory and constitutional mandates if compliance with those mandates does not violate federal law" (internal citations omitted)).

While states choosing to draw districts may avoid strict scrutiny under the Equal Protection Clause by respecting their own traditional districting principles and the states retain "'discretion to apply traditional districting principles,' in majority-minority, as in other, districts," *Bush*, 517 U.S. at 978, this does not mean that they may claim that a single traditional districting principle such as the County Line Rule allows them to avoid drawing districts required by § 2 under the totality of circumstances.[15] Thus, the Court rejects Defendants' argument that the VRA cannot require the Legislature to violate the County Line Rule.

The Court will thus consider Plaintiffs' § 2 results claims and *Gingles* maps, including those that create purported coalition districts and that violate the County Line Rule. However, the Court emphasizes that the VRA requires the County Line Rule to be subordinated only to the extent reasonably necessary to remedy a § 2 violation.

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[15] Two district courts have recently rejected Defendants' same argument. The court in *Georgia State Conference of NAACP v. Fayette County Board of Commissioners*, 950 F. Supp. 2d 1294 (N.D. Ga. 2013), *vacated on procedural grounds*, 775 F.3d 1336 (11th Cir. 2015), observed, as does this Court, that Defendants' argument "ignores the applicable framework of an equal-protection claim" and that, upon a finding that a plan subordinates traditional districting principles to race, "the district is not simply rejected as a racial gerrymander" but instead "the court applies strict scrutiny." *Id.* at 1304. The court further noted that Defendants' position "would have the Court collapse an equal-protection inquiry into the first *Gingles* prong" but "the court must first determine whether *Gingles* is met before ensuring that the proposed remedy complies with the Equal Protection Clause." *Id.* at 1305. The court in *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1401 (E.D. Wash. 2014) also rejected Defendants' position for "the reasons so cogently explained in *Fayette County*."

Accordingly, Plaintiffs' demonstration maps should attempt to honor the County Line Rule to the extent doing so is consistent with the VRA.

II. Intentional Vote Dilution and Select § 2 Results Claims by Geographic Area

The Court applies the analytical framework for intentional vote dilution claims under § 2 of the VRA and the Fourteenth Amendment as discussed in the congressional plan opinion. For § 2 results claims, the Court applies the *Gingles* framework, including as discussed above.

The United States asserts intentional vote dilution claims with regard to the entire plan, but points to specific districts as proof of intent, including districts in the Rio Grande Valley (including specifically HD41), HD35, Nueces County, El Paso (HD77 and HD78), Dallas County (HD103, HD104, and HD105), Bexar County (HD117 and HD118), and Harris County (HD137 and HD149). Docket no. 1304 at 2 n.1. The United States relies on circumstantial evidence as well as direct evidence, including: (1) the nudge factor emails and evidence that the nudge factor was implemented in certain Latino opportunity districts that elected an Anglo-preferred candidate in 2010; (2) racially focused statements by legislators and districting insiders showing they thought and spoke in terms of race; and (3) precinct splits, including the high number of splits in general (412 in Plan H283) and the indication that many splits were racial and indicate the use of race as a proxy for partisanship given that accurate political information is not available below the precinct level, while racial data is. Docket no. 1279 at 11-14.

The Perez Plaintiffs also complain that Plan H283 "intentionally discriminated against minority voters." Docket no. 960 ¶ 28. They (joined by the NAACP Plaintiffs) specifically allege such discrimination in Dallas County, Tarrant County, Harris County, Bell County, McLennan County, Fort Bend County, Nueces County, Bexar County, and HD41. *Id.*; ; docket no. 1303; docket no. 601. The NAACP alleges that Plan H283 was developed with the intent to disadvantage African-American and other minority voters. Docket no. 900 ¶ 62.

MALC challenges Plan H283 as a whole as intentionally diluting Latino voting strength by failing to draw new opportunity districts despite the population growth, using the County Line Rule to avoid drawing minority opportunity districts required by § 2 and diminishing Latino voting strength, packing and cracking politically cohesive Latino and minority communities, manipulating population, and racial gerrymandering. Docket no. 897 ¶¶ 2-10. MALC also specifically alleges that mapdrawers: pretextually used the County Line Rule to avoid drawing a new Latino opportunity district in the Midland/Odessa area of West Texas (¶ 38); eliminated a Latino opportunity district in Nueces County (¶ 42); failed to draw an additional Latino opportunity in Harris County (¶¶ 47-48); failed to provide minority opportunity in Fort Bend County and unnecessarily fragmented the minority population there to minimize its political strength (¶ 51); failed to draw an additional minority opportunity district in Bell County and intentionally fragmented the minority community in Killeen to minimize its political impact (¶¶ 54, 56); intentionally fragmented minority population while at the same time overpopulating Latino majority districts in Dallas

County, leading to the failure to create at least one and possibly two additional minority opportunity house districts in Dallas County (¶ 57); impermissibly focused on race and targeted low-turnout Hispanic voters for inclusion in HD117 in Bexar County to protect incumbent Republican John Garza (¶ 58); and drew the border between HD77 and HD78 in El Paso with racially discriminatory intent (¶ 59).

Defendants assert that the mapdrawers' application of the County Line Rule is not evidence of intentional vote dilution because it was a consistently applied neutral, traditional districting principle. Docket no. 457 at 68. Defendants further generally deny any improper use of race, arguing that any consideration or use of race was only as needed to comply with the VRA.

A. El Paso County

Plaintiffs assert that the El Paso County configuration, particularly HD77 and HD78, is evidence of intentional vote dilution. Plaintiffs assert "nudge factor" claims against HD78 and contend that it intentionally does not provide Latinos equal opportunity in an effort to protect the Republican incumbent Dee Margo. Plaintiffs also assert that five compact Latino opportunity districts should have been drawn in El Paso County compared to only four opportunity districts in Plan H283. Although the HCVAP of HD78 is over 50% (55.2%), Defendants admit that "Plan H283 did not create an additional majority-Latino district in El Paso," docket no. 413 FF71, presumably because it did not meet their 50% SSVR threshold even though it was (and all four other districts in El Paso County were) over 50% HCVAP.

The United States asserts that mapdrawers' intentional refusal to create a fifth Latino opportunity district in El Paso, even though it could be done without violating the County Line Rule or other traditional districting principles, and instead making a "policy choice" to protect the Anglo incumbent was intentional vote dilution. Docket no. 1279 at 36, 39-40. To do this, the United States argues, Downton manipulated the SSVR in HD78 and analyzed election data to ensure that the Hispanic candidate of choice was unlikely to be elected. Docket no. 1279 at 40.

The Task Force Plaintiffs argue that the Latino population "could be more evenly spread among all five districts in El Paso County," giving Latinos the opportunity to elect their candidate of choice in all five districts, and that Plan H283 packs Latino voters in El Paso County into the other districts to prevent Latino voters in HD78 from electing their candidates of choice. Docket no. 634 FF458, 459; docket no. 1282 at 2. The Task Force Plaintiffs contend that HD78 in Plan H283 is not a Latino opportunity district but that it could be drawn as an additional Latino opportunity district as in their demonstration Plan H292. Docket no. 1282 at 6.

MALC's Third Amended Complaint notes that the border between HD77 and HD78 has a bizarre shape with deer antler protrusions that split multiple precincts between these two districts. Docket no. 897 ¶ 59. MALC notes that its Plan H205 creates five reasonably compact majority-SSVR and majority-HCVAP districts in El Paso. Docket no. 412 at 18.[16]

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[16] In the interim plan, the Court remedied the "not insubstantial" § 5 claims in El Paso, finding that this also provided "an appropriate

Defendants assert that the "possibility of creating an additional Latino-majority Democratic district does not obligate the State to create it" and that Plaintiffs have failed to show that the totality of circumstances required such a district, especially given that "Democratic voters are consistently successful in electing their candidates of choice in El Paso County" and "the alleged number of Latino candidates of choice elected to the House from El Paso County—four out of five—is proportional to the Latino percentage of citizen voting age population." Docket no. 457 at 33.

Defendants further assert that the El Paso map was developed and agreed to by the five-member delegation, four of whom were Democrats and members of MALC, and all of whom were elected from HCVAP-majority districts. Docket no. 1249-1 at 10. Defendants point out that under both Plan H100 and Plan H283, all five districts were over 50% HCVAP and all but HD78 were over 50% SSVR, and assert that the levels of both were "substantially similar across both plans." Docket no. 1249-1 at 13. Defendants argue that "there is no evidence that the configuration of HD78 deprives any Latino voter in El Paso County of an 'equal opportunity' to participate in the political process or to elect candidates of their choice" and that, even if Plaintiffs could satisfy all three *Gingles* preconditions, they fail to "prove that the totality of circumstances requires the State to restructure HD78 to unseat the incumbent" because "Latinos are more than

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remedy for the alleged Section 2 . . . violations." Docket no. 690 at 11. The interim plan increased HD78's HCVAP to 58.3% "to provide minorities the ability to elect the candidate of their choice." *Id.* at 12. The Court finds that the § 2 results claims against the El Paso County districts are moot given the changes in the current plan.

proportionally represented in El Paso County's House delegation,"[17] "[t]he only possible basis for Plaintiffs' claim is the Legislature's failure to maximize Latino representation," and "[t]he Legislature's decision to maintain existing Latino population levels in the district, presumably offering some protection to the incumbent, does not support a finding of vote dilution." Docket no. 411 at 42; *see also* docket no. 457 at 31-32.

The Court finds that Downton reconfigured the border between HD77 and HD78 to intentionally dilute the Latino vote in HD78. Although Pickett, the County delegation dean, submitted two County proposals to Solomons, Downton chose the one that was not preferred by Pickett,[18] and he then made further changes to the

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[17] As MALC points out, Defendants agree that § 2 proportionality should be evaluated on a statewide basis when Plaintiffs assert statewide vote dilution claims, yet argue that no fifth Latino opportunity district is required in El Paso County because Latinos already have proportional representation with four districts. Docket no. 459 at 3. The Court finds that overall statewide proportionality is the relevant inquiry for Plaintiffs' § 2 claims. To achieve statewide proportionality, Latinos may be over- or under-represented in certain areas of the State. Exact proportionality in every area is not feasible, especially given the operation of the County Line Rule. Thus, while local proportionality is relevant in the totality of circumstances in determining whether an additional Latino opportunity district is required, § 2 proportionality in this case must ultimately be measured on a statewide basis, and over-representation in any given area cannot be the basis for rejecting an opportunity district.

[18] The evidence also indicates that Rep. Marquez may have impermissibly focused on race in making changes to HD77 and HD78 from the initial delegation map supported by Pickett. She specifically moved precincts into her district to increase her SSVR numbers in order to increase her own election chances, but there is no evidence that this was necessary for any compelling state interest such as complying with the VRA. However, the evidence is clear that any

border between HD77 and HD78 without input from the delegation. *See* TrJ2103 (Downton did not incorporate input from Margo or Marquez). The evidence appears undisputed that, after choosing to go forward with the Marquez map from the El Paso County delegation, Downton made further unilateral, race-based changes to the border of HD77 and HD78, ostensibly to address concerns raised by David Hanna about the fact that the SSVR of HD78 had dropped below benchmark levels. Hanna's memo stated that this "risk of retrogression . . . could easily be remedied by swapping some precincts with an adjoining district," especially in light of the disparity in SSVR between HD78 and the other El Paso districts. D-122. However, rather than follow Hannah's advice to increase the SSVR of HD78 by swapping a few precincts, Plaintiffs contend that Downton surgically split precincts and moved individual census blocks between HD77 and HD78, while monitoring election data to ensure that he did not create a Latino opportunity district. Docket no. 1279 (United States Brief) at 39-40. The Court agrees with this assessment.

Although Downton claimed to make these race-based splits with the goal of complying with § 5 by raising the SSVR of HD78 (TrJ2002, TrJ2102), his so-called "compliance" with § 5 was intentionally superficial because he wanted to protect the Republican incumbent elected in 2010, who was not the Latino candidate of choice. Downton's changes were designed to appear to comply with § 5 by increasing the SSVR of HD78, but without increasing or ensuring Latino ability to elect,

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race-based changes made by Marquez were not made with racially discriminatory intent.

which is the basis upon which § 5 permits such race-based districting actions. Downton's precinct splits were deliberate and based on more than simply increasing SSVR; his purpose was to increase the SSVR while simultaneously ensuring that election success rates remained minimally improved for Latinos.

Downton achieved his purpose by increasing the total SSVR by 1% (and non-suspense SSVR by .9%), while increasing election performance for Latinos by only .3 or .4%. PL-503; D-109. Further, Downton and mapdrawers knew from the OAG 10 that although HD78 remained at 2/10 wins for Latino-preferred candidates, the margin of victory for the two prevailing Latino-preferred candidates had been reduced from the benchmark. US-190; US-190A. This is not compliance with § 5, which looks to numerous factors, including Latino election success, in determining whether a district has "ability to elect," and does not just focus on a single demographic such as SSVR. In fact, increasing the SSVR while at the same time monitoring Latino ability to elect to ensure that it is not correspondingly increased is antithetical to the purpose of § 5 and the VRA and is intentionally racially discriminatory. The changes cannot be excused as mere partisan gerrymandering because of their racially discriminatory nature. Given the existence of racially polarized voting in El Paso County and the totality of circumstances, this manipulation constitutes intentional vote dilution in violation of § 2 of the VRA and the Fourteenth Amendment.

In sum, the § 2 results claims in El Paso County are moot, but the Court finds that mapdrawers intentionally diluted the Latino vote in violation of § 2 of the VRA and the Fourteenth Amendment with regard to HD78.

B. Bexar County

Benchmark HD117 was a Latino opportunity district, electing the Hispanic candidate of choice in three out of the five last endogenous elections. In 2010, it elected Republican John Garza, who was not the Latino candidate of choice. Numerous Plaintiffs contend that the Legislature intentionally diluted Latino voting strength in the district to protect Garza. Plaintiffs[19] argue that HD117 was no longer a Latino opportunity district in Plan H283 despite its majority-HCVAP and majority-SSVR status. The D.C. Court found that HD117 was an ability-to-elect district in the benchmark, but was no longer an ability district in Plan H283. *Texas v. United States*, 887 F. Supp. 2d 133, 170-71 (D.D.C. 2012), *vacated on other grounds*, 133 S. Ct. 2885 (2013). Based on a preliminary finding that mapdrawers were impermissibly focused on race in trying to make HD117 more Republican, this Court remedied the "not insubstantial" § 5 claim in the interim plan, reconfiguring HD117 to return it to benchmark performance levels. Docket no. 690 at 6.

The Task Force Plaintiffs bring a "nudge factor" claim against HD117 in Bexar County. The United States also asserts a nudge factor claim, arguing that mapdrawers replaced high-turnout Hispanic voters with poor, low-turnout Hispanic precincts to increase Hispanic population levels but decrease SSVR, Hispanic turnout, and Hispanic electoral performance. Docket no. 1279 at 41. MALC also alleges that "[i]n creating a district to safely re-elect Rep. Garza the state impermissibly focused

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[19] According to their proposed conclusions of law (docket no. 1265), the Perez Plaintiffs allege there is intentional vote dilution in HD117, but it is not briefed in their Post-Trial Brief (docket no. 1263).

on race by targeting low-turnout Latino precincts." Docket no. 897 ¶ 58.

Defendants argue that the Bexar County map was developed by the ten-member delegation, led by Democrats Villarreal and Ruth Jones McClendon. Docket no. 1249-1 at 15. Defendants contend that Garza wanted rural areas because he viewed them as more conservative and more likely to vote Republican, and that he wanted to create a rural, conservative district outside the City of San Antonio[20] to bolster his re-election prospects while maintaining SSVR over 50%, and that this is not evidence of racial animus. Docket no. 1249-1 at 17, 1249-2 at 23 (citing TrJ399 (Garza), TrJ1518, TrJ1523 (Interiano)). Defendants point to Farias's testimony that it was a partisan decision. Docket no. 1272 at 56 (citing Tr353-54).

Defendants argue that Speaker Straus and his staff determined that in order to achieve these goals, HD117 needed to include rural areas of southern Bexar County that were previously represented by Farias under the benchmark. Docket no. 1249-2 at 23 (citing TrJ1559 (Interiano)). Defendants assert that ultimately HD117 was agreed to by Rep. Villarreal and 9 of 10 members of the Bexar County delegation, that even if Garza had an improper motive, there is no evidence other members of the delegation were aware of that motive, and that Plaintiffs have not shown that Garza's individual motivations were a substantial or motivating factor

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[20] As noted in the fact findings, this is inconsistent with Garza's own testimony that other delegation members wanted some of the stronger areas within the City that had been in his benchmark district, and that he wanted to maintain some of this territory. TrJ372, TrJ378 (Garza). Further, Garza's proposed "ideal district" included some portions of the City.

behind the Legislature's adoption of the plan. Docket no. 1249-2 at 23-24; docket no. 1272 at 54.

It is undisputed that Garza's initial ideal district was rejected by redistricting leadership because it fell below 50% SSVR and that mapdrawers and redistricting leadership felt that HD117 had to be maintained above 50% SSVR to avoid retrogression. Defendants' argument that this was an agreed delegation map is demonstrably false with regard to the configuration of HD117. Rather, the evidence is clear that Garza's and Larson's staff worked with Interiano to draw the configuration of HD117 that was placed into Plan H283, and that Farias vigorously objected to the configuration of his district. The delegation members (except Garza and Straus) also voted against the motion to table Farias's proposed amendment. D-190 at 2294-95.

Interiano worked to draw a district with exactly 50.1% SSVR to maintain its appearance as a Latino opportunity district and avoid retrogression under the mapdrawers' majority-SSVR criterion, while minimizing Hispanic turnout. He added in areas such as Somerset and Whispering Winds with higher Hispanic population but low Hispanic voter turnout and removed areas inside San Antonio, such as areas of South San Antonio ISD, that had highly mobilized Hispanic voters. Hispanic population was manipulated to maintain exactly 50.1% SSVR while minimizing Hispanic turnout and electoral performance.

Although Interiano testified that they were simply trying to balance increasing SSVR with "keeping political numbers up," his explanations for the district were not credible, as discussed in the fact findings. His testimony that Garza wanted to stay outside the City was not credible, as noted. His testimony that Garza was

concerned with water issues also was not credible, given that Garza himself testified that the political issues surrounding Bexar Met were independent from redistricting, and he did not have any goals in redistricting relating to taking more or less of Bexar Met territory. TrJ405-08. Interiano's denial of using turnout to shape the district is not credible.

Rather, the Court finds that Interiano drew the district to increase SSVR while intentionally minimizing any gains in Latino electoral performance. This is consistent with Garza's own testimony. Garza testified at his deposition that his ideal district went farther north because the area was "more Anglo and more conservative," and he preferred more Anglo and more conservative areas because "[t]hey would tend to vote Republican." PL-454 (Garza 10-19-11 depo.) at 30-31; TrJ367-69 (Garza). He also testified that he and his staff had looked at turnout, including the turnout between Anglos and Hispanics. TrJ373. He testified that rural Hispanic turnout tended to be low, and he thought Somerset Hispanic turnout would be low. TrJ374, TrJ403-04. Further, Interiano and Garza's staff knew that Garza did not tend to win SSVR-majority precincts. PL-1664. The wishes of senior member Farias to maintain his relationship with Whispering Winds and Somerset were ignored and were not permitted to interfere with the goal of protecting Garza by suppressing Latino electoral performance. And Solomons' objection to Farias's proposed amendment, which would have kept the district at 50.1% SSVR—that it contained more split precincts—was obviously pretextual given the number of split precincts in the plan created by his own mapdrawers.

The final configuration of HD117 includes a very large gap between HCVAP and SSVR of 13.7 points, well beyond any gap in any other House district.[21] By minimizing Hispanic voter registration and turnout, Interiano successfully decreased the performance of HD117. According to Handley, HD117's performance on the exogenous election index went from 60% to 20%. Considering all the evidence, that Court finds that mapdrawers intentionally drew HD117 with 50.1% SSVR but with lower performance for Latinos by manipulating Latino population and turnout. Interiano was given authority to draw the maps by redistricting leadership, and his knowledge and motives must be imputed to the Legislature as a whole, regardless of whether individual members of the Legislature were aware of the information when they voted for the map. The configuration of HD117 is evidence of intentional vote dilution under § 2 of the VRA and the Fourteenth Amendment.

In sum, any § 2 results claims in Bexar County are moot, but the Court finds that mapdrawers intentionally diluted the Latino vote in HD117 in violation of § 2 and the Fourteenth Amendment.

C. Nueces County

It is undisputed that Nueces County had two benchmark Latino opportunity districts, though they both

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[21] Although Garza indicated that he would be happy with the higher HCVAP because those Hispanics could be registered to vote, he admitted that he and his staff did not take any actions to increase registration, TrJ432, and this testimony is also undermined by the fact that Garza and redistricters refused to allow HD117 to exceed 50.1% SSVR.

elected Republicans in 2010. It also contained part of a third district represented by Anglo Republican Todd Hunter. When faced with slower population growth in Nueces County such that it would only be entitled to two districts under the County Line Rule, Hanna advised mapdrawers that they had three options: (1) draw one "performing" Hispanic district and one not; (2) draw two equally Hispanic districts, which may not perform reliably; or (3) see if both Latino opportunity districts could be preserved by splitting county lines. D-122. Hanna advised that the County Line Rule would have to yield to the VRA if retrogression could be avoided by splitting the county and it would clearly contribute to total Hispanic voting strength statewide. As noted in the fact findings, mapdrawers chose the first option because they felt it allowed them to maintain more Republican seats and protect Republican Anglo incumbent Hunter. Mapdrawers did not look into whether two Hispanic districts could be maintained in Nueces County, either wholly within Nueces County or by breaking the County Line Rule.[22]

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[22] Mapdrawers and Hanna were concerned with whether districts were "performing" for § 5 purposes and used SSVR and election analysis (the OAG 10) to determine whether a district was "performing." In deciding to create one "performing district" and one Anglo-Republican district favoring the incumbent Hunter, redistricters felt they could eliminate HD33 for § 5 retrogression purposes so long as they "offset" the loss somewhere else in the State.

There is no indication that they seriously looked at whether § 2 might require two opportunity districts in Nueces County. Nueces County presents a strong case for requiring the State to follow § 2 of the VRA over the County Line Rule because the Legislature used the County Line Rule as a basis for destroying an existing Latino opportunity district (as opposed to simply refusing to draw a new

Defendants contend that the reduction in population combined with the County Line Rule eliminated the minority district in Nueces County, and the delegation proposed the new districts. They contend that the configuration reflects only partisan and neutral districting principles and does not violate the VRA. The configuration of Nueces County remains unchanged in the current plan.

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one). HD33 was 60.4% HCVAP using 2005-2009 ACS data available to the Legislature and was completely within Corpus Christi, but was underpopulated by almost 19,000 persons. HD34 was 58.2% HCVAP using 2005-2009 ACS data and was 24,000 underpopulated. Instead of trying to maintain HD33 in addition to HD34, HD33 was eliminated. As noted, redistricters believed they could offset the elimination of HD33 for § 5 purposes by increasing the SSVR of HD90 and HD148, both of which were already Latino ability districts. As noted by the D.C. Court in the § 5 preclearance litigation, "section 5 allows a state to dismantle an ability district as long as it offsets that loss by drawing a new ability district elsewhere." *Texas v. United States*, 887 F. Supp. 2d 133, 144 (D.D.C. 2012). However, as will be discussed, this use of race was improper because HD90 and HD148 were already ability districts, and thus Texas did not draw any "new" ability districts. In addition, § 2 of the VRA does not permit offsets. As discussed in the congressional plan opinion, a state may "use one majority-minority district to compensate for the absence of another only when the racial group in each area had a § 2 right and both could not be accommodated." Docket no. 1339 at 47 (citing *LULAC v. Perry*, 548 U.S. 399, 429 (2006). "Simply put, the State's creation of an opportunity district for those without a § 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right." *Id.* (quoting *LULAC*, 548 U.S. at 430). Because voters in HD90 and HD148 were already successfully electing their candidates of choice, those were existing ability districts for § 5 purposes (as found by the D.C. Court) and those voters did not have a § 2 right to be placed into a majority-HCVAP or SSVR district that could "offset" the failure to create or maintain opportunity districts elsewhere in the State if required by § 2.

The § 2 results claim in Nueces County presents two questions: (1) assuming only two districts are required within Nueces County, did plaintiffs prove a § 2 violation by the Legislature's failure to draw both as Latino opportunity districts? and (2) have Plaintiffs proven that the VRA requires more than two districts to be drawn in Nueces County (*i.e.*, a County Line rule violation)?

Defendants argue that Plaintiffs fail to prove a § 2 violation because Nueces County was only entitled to two districts and, "[a]ccording to the only population data available at the time the Texas House map was drawn, Nueces County's total SSVR percentage was 49.5%" such that creating two SSVR-majority districts within Nueces County was impossible. Docket no. 411 at 42-43. It is true that, at the time the first drafts of the map were created, the only current data mapdrawers had available was SSVR. Because Nueces County was less than 50% SSVR, it was mathematically impossible to draw two SSVR-majority districts within the County. However, mapdrawers knew that SSVR was typically lower than HCVAP, that Nueces County had been over 50% HCVAP in 2000, and that Hispanic population had increased while Anglo population had declined, meaning they had every reason to believe that the HCVAP of Nueces County was over 50% even without more recent HCVAP data.

Moreover, Defendants' assertion that HCVAP data was not available is simply untrue. The HCVAP data was available to mapdrawers by April 21, 2011, before the map went to the floor, and would have shown that Nueces County HCVAP was over 50%. Interiano stated at trial that he knew that the HCVAP of Nueces County exceeded 50%, Tr1463, and he also would have been aware that HCVAP was the appropriate measure for

determining whether § 2 required a Latino opportunity district. *E.g.*, US-76 (Opiela November 20, 2010 email, with Interiano copied, discussing that they needed to evaluate districts in terms of VAP and CVAP and stating that Fifth Circuit law clearly established CVAP as the standard). Downton testified repeatedly that he used a 50% HCVAP standard for measuring Latino opportunity districts. Nevertheless, Interiano as primary mapdrawer and other redistricting leaders continued to focus solely on SSVR for Latino districts in the Texas House plan, and never explored whether two HCVAP-majority districts could have been drawn wholly within Nueces County. TrA64-65 (Interiano).

In their briefing, the Task Force Plaintiffs assert that because Nueces County was over 50% HCVAP, two HCVAP-majority Latino opportunity districts could have been drawn wholly within the County.[23] However, while it is certainly theoretically and mathematically possible to draw two HCVAP-majority districts wholly within Nueces County, no plaintiff has provided such a proposed map or shown that the Latino populations in such districts would be compact, taking into account traditional redistricting principles. Thus, Plaintiffs fail to satisfy their burden under *Gingles* of showing that two Latino opportunity districts could be drawn wholly within Nueces County (*i.e.*, without violating the County Line Rule).

Plaintiffs have proffered demonstration maps that would maintain two Latino-majority districts in Nueces

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[23] "The citizen voting age population of Nueces County is 54.6% Hispanic, thus allowing for two districts wholly contained within the county to be majority HCVAP." Docket no. 1282 at 51 (citing docket no. 1274 FF742); docket no. 1296 at 32.

County by breaking the County Line Rule. Because Solomons decided never to break the County Line Rule to comply with the VRA, mapdrawers did not explore whether to include more than two districts in Nueces County or whether doing so would have been required by § 2 or § 5 of the VRA, despite Hanna's advice to investigate this issue. This Court has found, and Defendants do not dispute, that both Nueces County-based benchmark districts HD33 and HD34 were majority-Hispanic, majority-HCVAP, and majority-SSVR Latino opportunity districts, even though they did not elect the Latino candidates of choice in 2010. Although Defendants have argued that this was an agreed-upon delegation map, *see e.g.*, docket no. 1249-1 at 30, the evidence is clear that mapdrawers and redistricting leadership made the decision to eliminate HD33 and to create only one Latino opportunity district within Nueces County.

Plaintiffs' demonstration maps would purportedly maintain two Latino opportunity districts, but they subordinate the County Line Rule in order to do so. Defendants' objections to the maps include the violation of the County Line Rule and racial gerrymandering. The Court finds that consideration of this issue is premature—the Court cannot hold that the Legislature was required to break the County Line Rule to maintain two Latino opportunity districts in Nueces County without Plaintiffs first showing that it was reasonably necessary to comply with § 2 (*i.e.*, that two Latino opportunity districts could not be maintained consistent with the County Line Rule). Because, as explained above, Plaintiffs have failed to make that showing, this issue is not ripe for

consideration.[24] Thus, with regard to Nueces County, Plaintiffs have failed to demonstrate a violation of § 2's results test at this time. However, they may continue to pursue this claim with regard to Plan H358 in the 2013 plan trial because the Nueces County configuration remains unchanged from Plan H283.

In addition to the § 2 results claims based on the failure to maintain two Latino opportunity districts in Nueces County, Plaintiffs contend that the decision to eliminate an existing Latino opportunity district in Nueces County was intentional vote dilution. Plaintiffs also argue that the district lines for those districts that remained in Nueces County are evidence of racial gerrymandering and intentional vote dilution. *See, e.g.*, docket no. 1279 at 49-50. The United States notes that Plan H283 includes "a convoluted line that ensures Anglo control over HD32," that HD34 "was packed with a greater share of Spanish surnamed registered voters than any Nueces County district prior to the 2011 redistricting, leaving HD32 with a substantial majority of the Anglo voters in Nueces County," and HD34 was overpopulated compared to HD32. Docket no. 1279 at 50-51. The United States also contends that the "protuberance from HD34 . . . ensured that no potential Hispanic candidate with

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[24] In the interim plan Order, this Court also focused on SSVR and the fact that Plaintiffs had not presented a map creating two Latino districts without a county line cut, finding that "the only way to maintain two Latino districts in Nueces County is to cut a county line." Docket no. 690 at 8. The interim plan order was based only on preliminary findings and analysis, and Plaintiffs at that time had not argued that two HCVAP-majority districts could be drawn wholly within Nueces County. Further, the interim plan order did not rule out a conclusion that the VRA could require a county line cut. *Id.*

recent legislative experience—including the Republican incumbent of HD33, the former representative of HD33, and the former representative of HD34—would reside in the new HD32 to challenge the Anglo incumbent," and the State's witnesses provided no plausible alternative explanation for the convoluted boundary. Docket no. 1279 at 51. The Task Force also contends that the bizarre extensions along the border of HD32 and HD34 are evidence of racial gerrymandering. Docket no. 1282 at 64.

The Court agrees that the facts and evidence concerning the decision to eliminate HD33 in Nueces County demonstrate intentional vote dilution. Specifically, the Court relies on (1) the fact that redistricting leadership eliminated an existing Latino opportunity district without considering whether two Latino opportunity districts were required by § 2 of the VRA under the appropriate standard (HCVAP), (2) the fact that they decided to eliminate ability district HD33 without replacing it elsewhere but instead raised the SSVR of two existing ability districts to claim an "offset" under § 5 of the VRA and attempt to ward off § 2 challenges in bad faith,[25] and (3) the ultimate configuration of the remaining Nueces County districts as demonstrating racial gerrymandering.

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[25] As noted, there is no "offset" under § 2 of the VRA, but a traditional § 2 results claim requires a plaintiff to show that more HCVAP-majority districts could have been drawn, and thus redistricters attempted in bad faith to try to preclude such a showing by artificially increasing the number of HCVAP-majority districts in the plan (*e.g.*, they used the creation of HCVAP-majority HD148 to argue that no additional Latino opportunity districts were required in Harris County).

Mapdrawers intentionally did not consider whether § 2 required two districts in Nueces County, and used a false reliance on SSVR and the County Line Rule to justify their refusal to maintain two Latino opportunity districts in Nueces County. Further, they knew that HCVAP was the proper measure for a Latino opportunity district and had HCVAP data available before the map went to the floor, but insisted on using SSVR as the measure because SSVR was lower (and lower than 50%), and it allowed them to argue that mathematically, two SSVR-majority districts could not be drawn. Although Nueces County was majority HCVAP and had been since at least 2000, they refused to consider whether two HCVAP-majority districts could be drawn wholly within the County. In addition, mapdrawers and redistricting leadership steadfastly refused to consider whether the County Line Rule might have to yield to maintain two Latino opportunity districts in the area, despite Hanna's advice to the contrary. The Court finds that their refusal to consider the proper requirements of § 2 and to attempt to comply with it was in bad faith and intended to limit Latino opportunity.

Rather than attempting to comply with § 2 by maintaining two Latino opportunity districts, mapdrawers and redistricting leadership attempted to use § 5 as a shield for their failure to attempt compliance with § 2 and for eliminating an existing Latino opportunity district. Mapdrawers and redistricting leadership asserted that, under § 5, they could "offset" the loss of HD33 as an ability district by creating a new 50% SSVR district elsewhere in the State. Mapdrawers chose two districts that were already performing reliably for Latino voters despite being under 50% SSVR (HD90 and

HD148) and raised their SSVR over 50%, claiming that these "new" Latino districts could offset the loss of HD33 and avoid statewide retrogression for preclearance purposes. However, as the D.C. Court found (and as redistricters knew), these were already ability districts, and thus increasing their SSVR did not create any "new" ability district to offset the loss of HD33. Mapdrawers and redistricting leadership relied in bad faith on a 50% SSVR standard as the definition of "ability district" despite clear DOJ guidance to the contrary so that they could claim compliance with § 5 while simultaneously ensuring that no new Latino districts were created to offset the loss of HD33.

At the same time, increasing the SSVR in HD90 and HD148 increased the number of HCVAP-majority districts in the plan by at least one (HD148) and arguably two (using 2005-2009 ACS data, the HCVAP was of HD90 was 49.7 +/- 2%). Because § 2 results claims require plaintiffs to show that more HCVAP-majority districts could have been drawn, mapdrawers acted in bad faith to try to thwart such claims by artificially inflating the number of HCVAP-majority districts—creating them where there was no § 2 right because the districts were already performing for Latinos.

Redistricting leadership ignored warnings from Nina Perales in her April 27 letter that the HD33 loss was not offset by artificially increasing the SSVR in HD90 and HD148 and that additional Latino opportunity districts were required. They chose to increase the SSVR in districts *that were already performing for Latinos* so that they could claim VRA compliance and minimize the number of Latino opportunity districts without losing or jeopardizing any Republican incumbent seats—that is

why they did not raise the SSVR in El Paso County's HD78, which elected a Republican in 2010. Mapdrawers' use of race to increase the SSVR in HD90 and HD148 in the name of VRA compliance turned the VRA on its head—instead of using race to provide equal electoral opportunity, they intentionally used it to *undermine* Latino voting opportunity.

Further, there is evidence that the mapdrawers (including specifically Rep. Hunter) racially gerrymandered the districts that remained in Nueces County to further undermine Latino voting strength. There are ten precinct splits along the HD32/HD34 border, *see* US-387, indicating that mapdrawers were likely using race to assign population since accurate political data is not available below the precinct level. Although mapdrawers claimed that they needed to make HD32 "performing," there is no evidence that they needed to put as many Hispanic voters in HD32 as they did, either to comply with § 2 or § 5. Thus, mapdrawers intentionally packed Hispanic voters into HD32 to minimize their number and influence in HD34 and protect Hunter. As discussed in the fact findings, there is also evidence that they targeted low turnout minority areas for inclusion in HD34 and intentionally drew out potential Hispanic rivals (both Republican and Democrat), again to protect the Anglo incumbent. And, as discussed below, there is evidence that Hunter intentionally overpopulated HD32 (and underpopulated his own HD34), without a legitimate justification for doing so.

In sum, Plaintiffs' § 2 results claims are not moot, but Plaintiffs failed to prove them with regard to Plan H283. Because this configuration remains unchanged in the current plan, Plaintiffs may bring their results claims with

regard to the 2013 plan. However, the Court finds that redistricters intentionally diluted Latino voting strength by eliminating HD33 in Nueces County. Mapdrawers' use of race in HD90 and HD148 to "offset" this loss was not to comply with the VRA but to intentionally dilute Latino voting strength by (1) allowing redistricting leadership to claim that they were complying with the VRAdespite eliminating HD33 and creating no new opportunity or ability districts; (2) thwarting arguments that § 2 might require additional opportunity districts by artificially inflating the number of Latino-majority districts in the plan; and (3) racially gerrymandering and utilizing population deviations to further dilute the Latino vote in the remaining two Nueces County districts. As discussed in the congressional plan opinion, there is legally significant racially polarized voting in Nueces County. Given the existence of racially polarized voting and the history of discrimination and its legacy in Nueces County, and considering the totality of circumstances, the elimination of an existing Latino opportunity district and ensuing racial gerrymandering in Nueces County is intentional vote dilution in violation of § 2 of the VRA and the Fourteenth Amendment.

D. HD35

HD35 was and remains a district composed of whole counties, though the county configuration was altered in Plan H283 and all Hispanic population metrics were decreased from the benchmark configuration. The United States contends that HD35 was a Latino opportunity district in Plan H100 and is no longer in Plan H283, and this is the result of intentional vote dilution. Docket no. 1279 at 44-45.

The Court agrees that benchmark HD35 was a Latino opportunity district, though it elected a Hispanic Republican in 2010, who was not the Hispanic candidate of choice. As drawn pursuant to a court remedy in 2001, it had 51.5% SSVR. Over the decade, it elected the Hispanic-preferred candidate four out of five times, for an endogenous election index score of 80%. Its exogenous election index score was 40%. By the time of redistricting, the SSVR of the district had risen to 55.4%, yet Plan H283 reduced it to 52.7% through its new configuration of whole counties. Its exogenous election score dropped to 20%. Because of the SSVR reduction, Hanna advised mapdrawers to perform election analysis to measure its performance, and Interiano and mapdrawers knew from the OAG election analysis that the performance for the Hispanic candidate of choice decreased. Dr. Arrington testified that benchmark HD35 was an effective Latino opportunity district, but that it was no longer effective in Plan H283. TrJ119, TrJ134-35.[26]

During the session, MALDEF offered Plan H115 that increased the SSVR of HD35 to 58.2%, but it broke the County Line Rule. In addition, Rep. King (an Anglo Democrat) proposed an amendment (Plan H161) that would have changed the county configuration, but the

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[26] Dr. Engstrom, the Task Force's expert, found that enacted HD35 did not provide a reasonable opportunity for Latinos because they did not win a majority of votes cast in 7 general and 6 Democrat primary elections with Latino candidates more often than not. Engstrom Corr. Rebuttal Report (docket no. 307-1) at 28. However, the Task Force also takes the position that benchmark HD35 was not a Latino opportunity district. Defendants' expert Dr. Alford found that Democrats went from 28/48 (58%) wins to 23/48 (48%) wins in HD35. US-350 at 7 & Table 2.

incumbent Aliseda objected. He stated that the amendment increased his SSVR "a little bit more" (he stated it was less than .02%), but asserted that was not the reason he objected; rather, he asserted, it was because it made his district "into a more democrat district." D-13 at S183-84. Rep. Coleman offered Plan H232, which he stated "strengthened existing Latino opportunity district HD35" and made it more likely to perform. Martin opined that Plan H232 strengthened HD35 while preserving other Latino districts in the region and complying with the County Line Rule. Joint Expert Ex. E-5 (Martin Report) at 13-14.

According to the D.C. Court's opinion in the § 5 preclearance litigation, the parties agreed that HD35 in Plan H283 was not an ability district, but they disagreed on whether it was an ability district in the benchmark and thus whether there was retrogression. *Texas v. United States*, 887 F. Supp. 2d 133, 167 (D.D.C. 2012) (vacated on other grounds). The D.C. Court found that it had been an ability district because it had a high endogenous success rate (80%) despite lower exogenous index scores. The D.C. Court concluded that it no longer was an ability district in Plan H283 based on the "low exogenous election results for the enacted district combined with HCVAP changes that push the district even closer to the majority line." *Id.* at 168. It noted that this particular district presented "a close and very difficult case" and that it might have reached a different conclusion if presented "with more or different evidence," but that the State had not met its burden of proof. *Id.* at 168 n.37.

This Court finds that HD35 remains an opportunity district in Plan H283. The evidence shows that benchmark HD35 performed well for Latinos despite weak exogenous

election scores. Some changes to the district were required by the fact that it was underpopulated by 9.4%. Although Handley's index and the OAG 10 showed a one election decrease in Latino performance on the exogenous index between the benchmark and enacted districts, Dr. Engstrom's analysis actually showed an *increase* in Latino performance from 2-5 to 3-4. Plaintiffs have failed to meet their burden of proof of demonstrating that HD35 is no longer an opportunity district. In addition, as discussed in the fact findings, there is no evidence to support the United States' contention that mapdrawers manipulated turnout in this district. Accordingly, the Court finds that this district does not support a claim of intentional vote dilution or racial gerrymandering.

E. HD41

Several Plaintiffs, including MALC, Perez Plaintiffs,[27] and the United States, challenge HD41 as the product of racial discrimination and intentional vote dilution. Defendants contend it is merely the product of partisan gerrymandering to protect newly-Republican Aaron Peña.

The United States argues that HD41 was changed so significantly and contains so many split precincts that its continued status as an opportunity district is in question.

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[27] Perez Plaintiffs' proposed conclusions of law (docket no. 1265) assert intentional vote dilution with regard to HD41, but the district is not mentioned in their 2014 Post-Trial Brief (docket no. 1263). Their 2011 Post-Trial Brief argues that the population deviations in the district violate the Equal Protection Clause and that the Valley configuration is less consistent with the County Line Rule as construed by *Clements v. Valles* than MALC's and other Plaintiffs' proposals creating a Cameron+Hidalgo County district. Docket no. 401 at 14-15.

Although its HCVAP and SSVR percentages decreased by around 5%, they remained high at 72.1% HCVAP and 63% total SSVR. The D.C. Court concluded that HD41 remained a Hispanic ability district in Plan H283 because the court applied a 65% HCVAP ability presumption that was not disproved. Texas, 887 F. Supp. 2d at 169-70. Further, Hidalgo County was over 85% HCVAP. Dr. Engstrom concluded that HD41 in Plan H283 remained a Latino opportunity district. The Court finds that HD41 remains an opportunity district in Plan H283.

Nevertheless, the Court finds that HD41 was drawn in part with racially discriminatory (dilutive) motive. The United States argues that the precinct splits in the district cannot be explained by partisan motivation and were racially discriminatory. Docket no. 1279 at 45. Dr. Arrington looked at all splits in HD41 and found that they made the district more Anglo. However, the most relevant splits are those made after Plan H113[28] that actually involved some population. As discussed in the fact findings, some of Downton's precincts splits after Plan H113 were consistent with Anglo maximization to increase the Anglo VAP of the district, and they were not consistent with Republican maximization. Although mapdrawers (including Peña) testified that the changes were made to "maximize" the district for Republican performance, election analysis results showed that the changes resulted in a decline in Republican performance, with corresponding increases in Democratic performance. *See* US-517 (Red-225 Report for Plan H113); D-109 (Plan H283 reports). Thus, the explanation that the numerous

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[28] Peña's district had four precinct splits in Plan H113, but they were adequately explained by non-racial reasons.

precinct splits were made to "maximize" the district for Republican performance is not credible. Nor was other testimony offered by mapdrawers that the numerous precinct splits were made simply "to follow roads."

As noted in the fact findings, the district HVAP and HCVAP population did not change despite the substantial manipulation and precinct changes that occurred on April 17. However, although the *net* effect of all the changes made between Plan H113 and Plan H283 was not to make the district more Anglo and less Hispanic, that does not negate the fact that some particular precinct splits were made with a racially discriminatory motive. In Plan H113, Peña's district was significantly (4.92%) below ideal population, while the neighboring districts were all overpopulated. Downton recognized this as a potential problem and worked with Peña to increase the population of the district while "maximizing" it for Peña's benefit.[29] However, because the area is heavily Hispanic and the original configuration of the district already contained the most Republican areas, Downton had to work to increase the population of the district while simultaneously maintaining the Anglo and Hispanic populations in an attempt to protect Peña.

Downton increased the population of the district by 857 persons (he admitted to not increasing the population any more because it would make the district less favorable to Peña), but kept its racial population metrics basically the same, in part by using precinct splits in a racially discriminatory manner. Had he not utilized the precinct

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[29] As discussed in the section on the one person, one vote claims, HD41 was nevertheless left intentionally underpopulated because adding more persons would have meant adding more Hispanics.

splits in such a manner, the effect of increasing the population would have been an increase in Hispanic population in the district, making it more likely to perform for Hispanic voters (and redistricters presumed, less likely to re-elect Peña). Thus, although all of the precinct splits together did not negatively impact the Hispanic population of the district, the racially discriminatory precinct splits were used to offset the racially favorable splits.

In addition to manipulating total population, the SSVR of HD41 is significantly lower (63%/64.6%) than the other Hidalgo County districts, which are 85.8%/86.4% (HD40), 82.2%/83.1% (HD39), 85.1%/85.8% (HD36), and 90.8%/91.3% (HD31), and is lower than any of those benchmark district's SSVR levels, again demonstrating an intent to draw the district with fewer Hispanic voters. The SSVR of Peña's district was reduced, while the SSVR of three of the other districts was increased, and at the same time mapdrawers knew that the performance of HD41 for Latino voters decreased from 7/10 to 5/10 on the OAG 10. Although Solomons repeatedly touted the map as "member driven," the Hidalgo County configuration was not drawn with input from the other members of the Valley delegation and disregarded member-constituent relations in order to gerrymander the district, both politically and racially.

The Court thus finds that mapdrawers intentionally used race to draw the district to perform less favorably for Latinos. They also intentionally manipulated the SSVR and total population to dilute the Latino vote in HD41 in order to protect an incumbent who they believed would no longer be the Latino candidate of choice given his decision to switch parties. Given the existence of

racially polarized voting in the Valley (as found by Dr. Engstrom), the lingering effects of past discrimination in terms of socio-economic factors, and the totality of circumstances, the configuration of HD41 is racially discriminatory and constitutes intentional vote dilution in violation of § 2 and the Fourteenth Amendment. Although the individual members of the Legislature may not have been aware of this when they voted to pass Plan H283, Downton was given the authority to make these changes to the map and his intent must be imputed to the Legislature as a whole.

F. Cameron+Hidalgo/Rio Grande Valley configuration

The benchmark plan contained six Latino opportunity districts wholly within Hidalgo and Cameron Counties—four wholly within Hidalgo County and two wholly within Cameron County. The excess population in Cameron County was joined with counties to the north in HD43, also a Latino opportunity district. Plan H283 also creates six HCVAP-majority districts[30] wholly within Cameron and Hidalgo Counties (four within Hidalgo County and two within Cameron County); the surplus of Cameron County is joined into HD43 to the north, and the surplus of Hidalgo County is joined into HD31 to the west; both HD31 and HD43 are Latino opportunity districts.

The Task Force and MALC assert that § 2 required the State to create an additional district in the Rio Grande Valley by combining the surplus population of Cameron

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[30] As discussed, the continued status of HD35 and HD41 as Latino opportunity districts is challenged by the United States. The Task Force regards HD41 in Plan H283 as a Latino opportunity district. Docket no. 1282 at 6 n.4. The Court has found that HD41 remains a Latino opportunity district in Plan H283.

and Hidalgo Counties, creating seven Valley-based districts, and that this would actually be more consistent with the County Line Rule than the State's configuration. This was done in the Court's interim map (Plan H309) such that seven districts are wholly contained within Hidalgo and Cameron Counties, with no spillover. This is also done in MALC's Plan H201 through the creation of HD144 and MALC's Plan H295 through the creation of HD35. Additional proposed plans create a seventh Valley district but also include spillover in another district, including Task Force Plan H292 (HD32) and MALC Plan H205 (HD72).[31]

In their 2011 briefing, Defendants contended that the "undisputed evidence at trial showed . . . that creating a new district in Hidalgo and Cameron would have required the Legislature to violate the county-line rule in other parts of the State." Docket no. 411 at 44; docket no. 457 at 29-30; *see also* TrA78 (Interiano) ("I tried to do it, and I told David Hanna that I had not found a way to put the population together without causing a county line split further up the road."). This assertion has since been disproved, as shown in the Court's interim plan H309. However, it is true that all maps presented to the mapdrawers during the session that created this district also had a county line break around Nueces County.

Downton testified that it was permissible to create the Cameron+Hidalgo County district, but it was not legally

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[31] Both of these plans include 25 districts within Harris County, which affects districts outside of drop-in counties. Further, as noted, the NAACP also included such a district (HD72) in their demonstration Plan H202, but did not brief it as a required § 2 district. The Hidalgo County configuration of Plan H202 is identical to that of MALC's H205, but Cameron County differs.

required, and redistricters made a policy decision not to create it. TrJ2094-95. Defendants argue that no voter in that area suffered a § 2 injury from the State's chosen configuration because all Cameron and Hidalgo County voters are in Latino opportunity districts under either configuration. Docket no. 1272 at 102.[32] The Court agrees that *if* the Legislature created the required number of § 2 districts and substantially addressed the § 2 violation, they had discretion in determining the configuration of the districts. However, Plaintiffs are arguing that creation of the Cameron+Hidalgo district was more consistent with the County Line Rule, recognized the Latino growth in the Valley, and allowed for the creation of an *additional* Latino opportunity district over the number created in Plan H283, which could establish a § 2 violation.

Thus, for Plaintiffs to succeed on their § 2 results claim, they must demonstrate that creating this additional Hidalgo+Cameron district creates *more* Latino opportunity districts in South Texas (or statewide) than does Plan H283. Although Plan H201 creates an additional Valley Latino opportunity district over Plan H283 by adding HD144 and retaining HD33 by utilizing a county line split, HD35 is no longer a Latino opportunity

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[32] The Task Force responds that Defendants miss "the critical difference between the voters of Cameron and Hidalgo Counties living in *six* Latino opportunity districts versus living in *seven* Latino opportunity districts." Docket no. 1296 at 36 (emphasis in original). To the extent the Task Force is thus arguing that § 2 required the State to draw seven districts wholly within Cameron and Hidalgo Counties instead of six wholly within and two partially within simply so that the voters of Hidalgo and Cameron Counties could have seven districts to themselves, the Task Force fails to support this assertion legally.

district, whereas it is in Plan H283. Plan H283 has 13 South and West Texas Latino opportunity districts (not including El Paso but including Nueces County). Plan H201 has 14, but only because it maintains HD33 in Nueces County district. Thus, it is really the retention of HD33 as a Latino opportunity district that results in an additional HCVAP-majority district over the enacted plan. This issue therefore boils down to the Nueces County issue, and the Court will not consider proposed maps that split Nueces County to create an additional district until it is shown that two Latino opportunity districts cannot be drawn wholly within Nueces County.[33]

The Task Force contends that Plan H292 adds HD33 in Nueces County and HD35 in the Valley compared to Plan H283. But it does not count HD35 in Plan H283 as an opportunity district. Counting HD35 in Plan H283 as a Latino opportunity district, the only additional district created is in Nueces County.[34] Again that simply boils

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[33] Similarly, eleven-district "plug in" plan H294 does not create an additional HCVAP-majority district; it just reconfigures the districts.

[34] The Task Force uses a combination of demographics and Dr. Engstrom's 13-election analysis to classify a district as a Latino opportunity district or not. Using the Task Force's classifications, Plan H283 has 12 districts in South/West Texas (excluding El Paso) and Plan H292 has 14. Plan H283 includes: 31, 34, 36, 37, 38, 39, 40, 41, 42, 43, 74, & 80, while Plan H292 has 14, including those same districts plus 32, 33, 35, but not 80, for an increase of two districts. However, this Court does not agree with the Task Force's classification of all opportunity districts, and for the reasons explained in the Congressional map opinion, has rejected a 50% success test for determining opportunity. The Court has concluded that HD35 in Plan H283 is a Latino opportunity district, and as such the increase in Plan H292 is only one district—HD33 in Nueces County. It may be that HD80 (with a HCVAP of 55.9%) in Plan H292

down to a Nueces County issue. Plan H292 also has 25 districts in Harris County, which has ripple effects in all the non-drop-in county districts statewide because there is one less district outside the drop-in counties.

MALC Plan H295 creates seven districts wholly within Hidalgo and Cameron Counties by moving HD35 to the Valley. Again, however, it does not appear to create more Latino opportunity districts other than the Nueces County district.

Plan H205 purports to create an additional district over Plan H283. It also splits Nueces County to create a Latino opportunity district, and it includes 25 districts in Harris County. Further, Plan H205 substantially disregards the County Line Rule—Defendants argue that it violates the County Line Rule at least 25 times. Docket no. 457 at 29-30; docket no. 645 at 14-15. Plaintiffs must show that these County Line Rule violations were reasonably necessary to comply with § 2 and, given the Court's conclusion below that the proposed West Texas districts are not compelled by the VRA, resulting changes to that portion of the map will also affect non drop-in county areas of the State, making an analysis of the number of Latino opportunity districts created in South Texas unreliable. Given these issues and the fact that the current plan includes the Hidalgo+Cameron district but not HD35, the Court finds that this results claim is best resolved with regard to the 2013 plan in effect.

However, certain Plaintiffs (including the United States and the Task Force Plaintiffs), argue that the

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is also a Latino opportunity district, but the Task Force has not made such a claim (in fact it claims it is not one) nor provided evidence or briefing to support it.

State's "deliberate decision not to recognize explosive Hispanic growth in the Rio Grande Valley through the creation of an additional Hispanic opportunity district constitutes intentional vote dilution." Docket no. 1279 at 39. The Court finds that Plaintiffs have failed to prove an intentional vote dilution claim based on the failure to draw the Cameron+Hidalgo district. As noted, mapdrawers were not presented with a plan that clearly created an additional Latino opportunity district compared to what they had drawn, and they had discretion in choosing how to configure the Hidalgo and Cameron County districts to address § 2.

G. Harris County

In addition to their one person, one vote claims based on population deviations (addressed below), Plaintiffs assert §2 results and intentional vote dilution claims in Harris County. Plaintiffs primarily complain that Defendants did not create an additional minority opportunity district in Harris County despite the minority population growth, but also contend that the Legislature's decision to reduce the number of districts in Harris County to 24 and to eliminate HD149, which Plaintiffs contend was a tri-ethnic coalition district, while protecting Anglo districts with slower population growth, were racially discriminatory actions designed to dilute the minority vote.

The Task Force Plaintiffs argue that an additional Latino opportunity district could have been drawn in Harris County. MALC offers demonstration district HD144 in Plan H205 and Plan H295 (though Plan H205

includes 25 districts in Harris County).[35] The NAACP also complains about the reduction of minority voting strength in HD144, which it argues had naturally become viable for minorities given the population growth, and argues that an additional minority coalition district could have been drawn (by maintaining both HD137 and HD149), as shown in Plan H202 (which has 24 districts in Harris County). Docket no. 625 at 5-7; docket no. 1280 at 37.

Defendants admit that "Plan H283 did not create additional majority-Latino or majority African American districts in Harris County," though they assert that the SSVR and HCVAP of HD148 were increased over 50%. Docket no. 413 FF62.[36] They argue that the reduction of districts in Harris County was not discriminatory but

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[35] Defendants argue that Plan H205 creates the same number of Latino opportunity districts (4) in Harris County (HD140, HD143, HD144, and HD145) as Plan H283 (HD140, HD143, HD145, and HD148). Docket no. 457 at 30-31. Defendants contend that Plan H205 also "retrogresses" HD148 by reducing its SSVR from 40% to 35.7%, whereas Plan H283 "strengthens Latino make-up of this district by increasing the SSVR to 50.0%." *Id.* at 31 n.16.

[36] Defendants assert that, "at the request of MALDEF, H283 increased SSVR and HCVAP to over 50% in Harris County House District 148." Docket no. 413 FF62. Using their demographic criteria for opportunity districts, Defendants argue that Plan H283 creates nine minority opportunity districts, and that none of the proposed 25-district plans creates more than nine (they say Plan H292 creates 9), while other plans create fewer. Docket no. 411 at 45; docket no. 413 FF85-88. However, to the extent the Legislature increased the SSVR of HD148 in order to count it as an ability or opportunity district for purposes of the VRA, it created a § 2 remedy where there was no § 2 liability because it is undisputed that HD148 routinely elected the Latino candidate of choice. Thus, the Legislature's choice to artificially inflate the SSVR (and with it the HCVAP) of HD148 does not preclude Plaintiffs from arguing that a different Latino opportunity district was required in Harris County.

"resulted from basic arithmetic and the combined legal requirements of the Texas and United States Constitutions." Docket no. 457 at 69. They also assert that the Democrat members never offered a proposed map such that "Downton worked from a proposal supplied by the Republican members of the delegation" and "then accommodated Democratic changes to the extent possible." *Id.* Defendants argue that the decision to apportion 24 seats in Harris County "did not prevent the creation of an additional minority-majority district" and that "Plaintiffs have not demonstrated that the addition of another district in Harris County would have resulted in an additional minority opportunity district." Docket no. 411 at 45. Defendants also contend that neither HD137 nor HD149 was a protected minority coalition district and that the decision to eliminate them was partisan, not racial. *Id.* at 45-46.

In this Court's interim plan H309, the Court found that Plaintiffs had demonstrated a likelihood of success on the merits of the § 2 claim in eastern Harris County, specifically that Plaintiffs had presented numerous demonstration plans illustrating that an additional compact majority-HCVAP district was possible in eastern Harris County, and made a preliminary finding that creation of a new Latino opportunity district was justified by the totality of circumstances. Docket no. 690 at 8-9. The Court's interim plan thus reconfigured HD144 in the manner requested by Plaintiffs to have a majority HCVAP. *Id.* The Court also maintained both HD137 and HD149, finding that the § 5 claims were not insubstantial, and making no other claims determinations. *Id.* This configuration remains in the plan adopted by the Legislature and currently in effect (Plan H358). Given

that the current plan includes a district similar to MALC's proposed HD144 and maintains both HD137 and HD149 with only 24 districts, the results claim is moot.

However, Plaintiffs claim that the decision to reduce Harris County to 24 districts, the elimination of HD149, and the deliberate failure to draw any new opportunity districts in Harris County are evidence of intentional discrimination.[37]

MALC contends that redistricting leadership had discretion to choose either 24 or 25 districts, yet chose 24 to avoid drawing an additional Latino opportunity district in Harris County. Docket no. 459 at 17.[38] Other Plaintiffs also complain that the decision to decrease the delegation to 24 was intentionally racially discriminatory because it would eliminate a minority district. The Court finds that the mapdrawers' decision to include only 24 districts in Harris County was reasonable, given the language of the Texas Constitution and simple math, and was not intentional vote dilution. The Court notes that Hanna recommended rounding down to 24 districts initially, even when he believed this would mean the loss of a Republican seat. D-192. He noted that 24 more closely tracked the constitutional language, and that the risk of choosing incorrectly was "catastrophic" in terms of affecting all

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[37] The Perez Plaintiffs cite Harris County as an example of intentional fragmentation (docket no. 1263 at 5), but there is no briefing on this issue in their 2014 Post-Trial Brief. Their proposed conclusions of law (docket no. 1265) refer to HD132, HD137, HD145, HD148, and HD149 as districts that evidence discrimination.

[38] MALC points to its Plan H205, which it asserts "maintains the current Latino opportunity districts, but also enhances the Latino population in district 144 so that it goes from an emerging Latino district to a true Latino opportunity district." *Id.* at 17-18; docket no. 1185 at 13 n.29.

districts outside of the drop-in counties. D-135. The Court is not convinced that past practice of rounding up indicates pretext in this case, given that different decisionmakers were involved in those decisions (different legislature and the LRB), and that Democratic and minority members had voted to round down in the prior legislative session when presented with similar numbers. The Court does not find any evidence to support the assertion that the decision to round down to 24 was racially discriminatory.

The NAACP Plaintiffs argue that Texas ran afoul of the Supreme Court's warning in *Bartlett v. Strickland* by intentionally eliminating a performing minority district (HD149)[39] in violation of the Fourteenth Amendment. Docket no. 1294 at 14. They contend that Interiano admitted dissolving HD149 despite knowing it was a district in which a diverse group of minority voters elected the candidate of their choice, Hubert Vo, because they did not think the VRA required them to maintain it. Docket no. 1280 at 37 (citing Tr1482 (Interiano)). They argue that "[t]his callous disregard for proven voting rights gains from an extant cohesive minority population is certainly evidence of an intent to discriminate . . . ." *Id.*

The Court need not decide whether HD149 was a protected coalition district because the evidence does not sufficiently support Plaintiffs' claim that it was targeted

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[39] The NAACP argues that HD149 "was a compact, naturally-occurring multi-ethnic coalition district whose voters had a proven track record of being politically cohesive and electing their candidate of choice, Rep. Vo." Docket no. 1280 at 37. They note that HD149 could have been preserved even with a 24-district configuration, as shown in their Plan H202, and without diminishing HD137 Docket no. 1280 at 37-38 (Joint Map Ex. J-25).

for removal because it was a minority opportunity district or because its elected representative was a minority candidate of choice, rather than simply because it was electing a Democrat. Mapdrawers and redistricting leadership did not believe it to be a protected minority opportunity district and it was chosen for removal because one district was being eliminated and Republicans saw an opportunity to pair two Democrats, thereby increasing Republican seats and protecting all other incumbents.[40] The pairing of two Democrats was consistent with Solomons' decision to always pair two members of the same political party to theoretically give each incumbent a chance to be re-elected in the general election.

Plaintiffs further contend that the enacted 24-district configuration in Harris County intentionally diluted minority voting strength. The Task Force complains that no new Latino opportunity district was created and that instead Latino voters were packed into other districts to minimize their electoral influence. The Task Force Plaintiffs note that Hanna's April 12 memo advised redistricting leadership to consider whether a fifth Hispanic-majority district could be drawn and whether it would be required by § 2, yet mapdrawers ignored this

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[40] Defendants note that the United States contended in its interrogatory responses (D-120) that redistricting leadership ignored advice from David Hanna of the TLC regarding whether the minority coalition districts in Harris County were protected. Docket no. 1249-1 at 23. However, Hanna's initial assessment of HD137 as a Latino opportunity district changed, and he later advised that it was not a protected district. D-123. Hanna never advised that HD149 was a protected district, and in fact characterized that as a "novel" theory. Id.

advice. Docket no. 1274 FF472, 483, 749; docket no. 1282 at 26, 33. Hanna testified that he was able to draw a fifth Latino district. TrJ1207. Downton claimed he did not attempt to draw one and does now know if anyone else did. TrJ2052-53.

MALC asserts that mapdrawers avoided creating a new Latino opportunity district in Harris County by artificially increasing the SSVR in HD148 (incorrectly cited as HD145) even though it was already performing for Latino voters. Docket no. 1185 at 13 n.29. MALC argues that this increase of SSVR in a "district that the State itself has characterized as a performing Latino opportunity district, to avoid the development of a real new Latino opportunity district in Harris County is not evidence of compliance with Section 2, but rather evidence of intentional discrimination." Docket no. 412 at 20.

The Perez Plaintiffs note that Anglo population in Harris County declined such that Anglos are now only 33% of the population, yet Plan H283 gives them control of 54% of seats. Docket no. 401 at 11.[41] They argue that

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[41] They note that the plan was drawn by the Republican delegation, with Democrat and minority members marginalized, and "every Anglo member in Harris County is protected." *Id.* at 12-13 (citing Tr349 (Martin)). Defendants take issue with this statement, noting that Hochberg, an Anglo, was paired and therefore not protected. However, Plaintiffs have argued that Hochberg was favored in this pairing, and thus it was racially discriminatory. The Court concludes that Plaintiffs have failed to prove that the ultimate configuration favored Hochberg for racially discriminatory reasons.

Plaintiffs further point to various racial references made by the Republican delegation members, who drew the initial Harris County configuration. These include references in Rep. Smith's plan log (US-441) to making districts "more Hispanic" or "more Anglo" and statements made by Rep. Woolley to Rep. Coleman. The Court

"creative line drawing" and population deviations were necessary tools in this accomplishment. Docket no. 401 at 13 (citing Tr341-42 (Martin)).[42] They further note that, although Interiano testified that they increased the SSVR in HD148 at MALDEF's urging, Nina Perales sent a letter to Solomons "specifically repudiating any such request." *Id.* at 13-14.[43]

The Court finds that there is persuasive evidence of intentional vote dilution in Harris County. Harris County is yet another example of where the member-driven process was at odds with § 2 compliance. Redistricting leadership assumed that county delegations would consider VRA compliance because the delegations contained minority members, yet in Harris County the minority members were essentially shut out of the initial map-drawing process.[44] Accordingly, although Hanna had recommended considering whether an additional Latino opportunity district could be drawn (as he was able to),

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agrees that these references are evidence that the Republican delegation members were thinking in terms of race when drawing the Harris County districts, but it does not rely on these statements to find intentional vote dilution.

[42] As discussed in the fact findings, some of the initially suspect lines in Harris County turned out to be the result of the minority Democrats' changes, not racially discriminatory gerrymandering.

[43] The Court notes that Perales did not "repudiate" MALDEF's assertion that the SSVR/HCVAP of HD148 could or should be increased above 50%. Rather, she asserted that increasing the SSVR/HCVAP of existing ability districts HD90 and HD148 could not offset the loss of HD33 because they were existing ability districts, and that additional Latino opportunity districts were still required.

[44] As detailed in the fact findings, when minority members were eventually given an opportunity to give input, they were severely restricted, and unable to affect the Republican districts without agreement.

this recommendation was ignored. Anglo Republican districts in eastern Harris County, which had grown more slowly than the more heavily minority areas, were protected, and no new minority district was considered, even though the evidence shows that a new Latino opportunity district could have been drawn that reflected the Hispanic population growth in Harris County.[45]

Faced with a map that failed to create any new Latino opportunity districts, mapdrawers then artificially inflated the SSVR and HCVAP of existing Latino ability district HD148 to claim VRA compliance. Redistricting leadership feigned VRA compliance but used it to undermine minority voting strength instead of truly complying with the Act. They claimed that newly majority-SSVR/HCVAP HD148 could offset the loss of existing ability district HD33 in Nueces County and used it to thwart claims that an additional Latino opportunity district was required by § 2 based on the number of HCVAP-majority districts in Harris County.

Yet the evidence is clear that mapdrawers already viewed HD148 as one of the performing Latino districts in Harris County. And as the Task Force Plaintiffs note, Downton agreed that raising the SSVR of HD148 to 50% did not enhance the ability of minority voters to elect their candidate of choice. Docket no. 1282 at 60; docket no. 1274 FF822; TrJ2050 (Downton). Thus, mapdrawers were

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[45] In the interim map proceedings, Defendants noted that their proposed Plan H303 created an additional HCVAP-majority district (HD144) while maintaining the four existing Latino ability districts (HD140, HD143, HD145, and HD148), and that HD144 "reflects the strong growth of the Latino population in Harris County," though they refused to concede that the *Gingles* factors or the totality of circumstances required a new district. Docket no. 668 at 10-11.

using this superficial compliance as a tool to avoid creating any new minority opportunity districts (more specifically, to defend their failure to create any) and to mask the loss of HD33 as an existing opportunity district.[46]

Given the existence of racially polarized voting, the lingering effects of past discrimination, and the totality of circumstances, the Court finds that the Harris County configuration is the result of intentional vote dilution in violation of §2 and the Fourteenth Amendment.

H. Fort Bend County

The NAACP and MALC contend that an additional minority coalition district was required in Fort Bend County. The NAACP Plaintiffs argue that this was an area experiencing substantial population growth among a diverse group of voters, mostly minority. Docket no. 1280

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[46] Plaintiffs have argued that increasing the SSVR of HD148 was packing, made it more difficult to create an additional Latino opportunity district in Harris County, and weakened minority influence in other districts. *See, e.g.*, Tr345-46 (Martin); Joint Expert Ex. E-5 (Martin Report) at 6-7; Farrar Decl. (docket no. 331-3) at 4 (noting that fewer Latinos were available to buttress emerging minority districts like HD138 and HD144). However, when the SSVR of HD148 was increased between Plan H113 and Plan H153, population was merely shifted among several minority districts, meaning that no additional minority votes were placed in a minority district and "wasted." Thus, the act of increasing the SSVR in HD148 was not itself packing. However, mapdrawers used the fact that HD148 was now over 50% SSVR and HCVAP to ward off claims under § 2 that additional Latino districts were required. And, as noted, they used it in bad faith to claim offset of the loss of HD33. In addition to intentional vote dilution, the Court notes that this racial manipulation of the district for the sole purpose of inflating the SSVR of HD148 would seem to present a clear *Shaw*-type racial gerrymandering case, but no party has asserted such a claim.

at 38 (citing TrJ1411 (Korbel)). They assert that, "[i]nstead of drawing compact districts that would recognize the naturally occurring minority district in Fort Bend—that is, the 150,000 more minority voters than Anglo added over the decade—the enacted plan drew HD 26 as an incredibly non-compact district, intended to be one that could be maintained as an Anglo district over the decade." Docket no. 1280 at 38 (citing TrJ1412-14 (Korbel) and TrJ1607 (Interiano)). MALC asserts that minority population contributed 80% of the growth for Fort Bend, Wharton, and Jackson Counties, and new HD85 was placed there to account for growth, but it is not a minority opportunity district. Docket no. 1275 FF90, 91 (citing Tr1412 (Korbel)). MALC further contends that a "heavy concentration of minority Texans in Fort Bend County is divided into 4 districts, which has the effect [of] diminishing the electoral opportunities of minorities." Docket no. 1275 FF92 (citing Tr1416-17 (Korbel)).

The NAACP offers Plan H202, with HD26 as a proposed tri-ethnic coalition district that would operate as an Asian-American opportunity district. Docket no. 406 at 33. The NAACP argues that African-American, Latino, and Asian-American voters in the larger Houston area are politically cohesive, that this district had become viable for minority voters in the benchmark,[47] and that the

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[47] Certain parties argued in the D.C. Court preclearance litigation that HD26 had become an ability district, but the D.C. Court disagreed because "the only evidence presented" showed it was not a majority-minority district and it was currently represented by an Anglo Republican. *Texas v. United States*, 887 F. Supp. 2d 133, 175 (D.D.C. 2012). The Court noted, "At best, the evidence may show that the districts are beginning to favor minority-preferred candidates, but section 5's effect prong protects only existing, not emerging,

voters in this area are similar to those who act in a tri-ethnic coalition to elect Vo in HD149, just across the line in Harris County. Docket no. 625 at 7-8; docket no. 1280 at 38 (citing TrJ1422 (Korbel)).

Proposed HD26 in Plan H202 would be 12.9% HCVAP, 14.5% Black Alone CVAP, 23.8% Asian CVAP (for a combined minority CVAP of 51.2%), and 47.7% Anglo CVAP using 2005-2009 ACS data. Joint Ex. J-25. The NAACP tenders Fairfax's opinion that the district had become 57% minority CVAP by 2014 and that it complies with traditional redistricting criteria including compactness, contiguity, and respecting political subdivisions. Tr841-42, TrJ902. Rep. Senfronia Thompson testified about the coalition here and concluded HD26 would elect an Asian American and the candidate of choice of minority voters. TrJ1245-46. The NAACP Plaintiffs also assert that the evidence applicable to Harris County is "equally applicable to the creation of a new minority State House District in this area" because voting in the "larger Houston metro area is racially polarized, and the area has historically demonstrated high

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ability districts." *Id.* According to the 2005-2009 ACS data available to redistricters, benchmark HD26 was 53.5% White Alone CVAP (though it was only 39.4% Anglo in terms of total population and 41.9% Anglo VAP), and 10.5% HCVAP, 12.6% Black Alone CVAP, and 22.2% Asian Alone CVAP. Thus, it remained majority-Anglo CVAP using 2005-2009 ACS data. However, using 2008-2012 ACS data, which the Court has concluded better reflects the true population in 2010, it had become majority-minority CVAP: the White Alone CVAP was 48.2%, Asian Alone CVAP was 25.9%, HCVAP was 12.7%, and Black Alone CVAP was 12.1%. In Plan H283, HD26 is again Anglo-majority CVAP: it is 57.3% White Alone CVAP, and 11.6% HCVAP, 10.6% Black Alone CVAP, and 19.6% Asian Alone CVAP using 2005-2009 ACS data.

levels of political cohesion amongst minority voters." Docket no. 406 at 33.

Visually, HD26 is relatively compact looking, and where its shape is somewhat odd it appears to follow a river. Existing HD27 also appears visually compact and is virtually the same configuration as in Plan H283. However, the districts do split the cities of Sugar Land, Missouri City, and Arcola. Further, even when a district is visually or geographically compact, Plaintiffs must still proffer evidence that the minority communities within the proposed district are compact, taking into account traditional redistricting principles. *See Gonzales v. Harris Cty., Tex.*, 601 F. App'x 255, *257 (5th Cir. Feb. 9, 2015) (affirming district court's conclusion that although plaintiffs presented a "geographically compact hypothetical district" that satisfied the numerosity requirement, plaintiffs nevertheless failed to satisfy the compactness precondition because their plans did not respect traditional districting principles). Other than compactness scores, Plaintiffs have not proffered any specific evidence concerning the compactness of the minority community in light of traditional districting principles such as respecting cities.

Further, even if the NAACP Plaintiffs satisfied the first *Gingles* precondition, they did not proffer sufficient evidence supporting the second and third *Gingles* factors. The NAACP Plaintiffs offered only lay testimony concerning minority cohesion in Fort Bend County. While lay testimony is relevant, statistical data is essential when asserting cohesion among three different minority groups. The Court will not infer cohesion in Fort Bend

County based on cohesion in nearby HD149 in Harris County.[48]

MALC offers Plan H329 that would create coalition districts HD26 and HD27. MALC-128. MALC also offers demonstration Plan H366 with "plug-in districts" for Fort Bend County. MALC introduced the expert opinion of Dr. Brischetto concerning racially polarized voting, though he only examined 2012 elections. The Court finds these plans should be addressed in the 2013 plan case, but notes that MALC must offer evidence demonstrating that the minority communities contained within these proposed districts are compact, taking into account traditional districting principles.

Several Plaintiffs point to Fort Bend County as evidence of intentional vote dilution. The Perez and NAACP Plaintiffs contend that mapdrawers racially gerrymandered by splitting the minority community among HDs 26, 28, and 85. Docket no. 1303 at 5 (citing Martin report at 12). MALC notes that there are "several" precinct splits "between HD26 and other districts in Fort Bend County" and "[a]ll of the evidence points to the fact that the State used race-based mapping splitting precincts along racial lines to lessen minority voting strength." Docket no. 1185 at 8. Plaintiffs note that Fort Bend County is only 38% Anglo, but Anglos control

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[48] The Court has found that the Perez Plaintiffs did not bring § 2 results claims, though they did submit demonstration Plan H290 for Fort Bend County. To the extent this was offered as a *Gingles* plan, the Court finds that they did not proffer sufficient evidence that the minority communities within the proposed minority districts are compact, especially in light of the bizarre shapes and the fact that the cities of Sugar Land and Rosenberg are split.

71% of the 3.5 seats anchored there in Plan H283. Joint Expert Ex. E-5 (Martin report) at 12.

Defendants argue that Fort Bend County was represented by two Republicans and one Democrat, and the incumbents signed off on the districts. Docket no. 1272 at 77; docket no. 1249-1 at 27-29 (citing April 27, 2011 House Journal Supp (D-190) at S766 wherein Rep. Howard says all three members worked together and signed off the configuration and do not want to change it). Defendants further assert that Plaintiffs fail to prove dilutive effect because it was not possible to create an additional district in which any single minority group was a majority of the citizen voting age population, and Plaintiffs failed to prove the necessary cohesion among Asian-American, African-American, and Hispanic voters for a coalition district. Docket no. 1272 at 79.

NAACP Plaintiffs contend that Defendants' response to claims that redistricters fragmented the minority community seems to rest solely on the fact that the map for the area was approved by all delegates, including one Democrat. Docket no. 1294 at 14. However, they argue that, rather than this being a member-driven map, Interiano testified that he drew it with input from the members, and he noted that the two Republican members wanted their districts to remain Republican through the decade even though this was a diverse and rapidly growing area of the state. *Id.* (citing TrJ1604-05, TrJ1607, TrJ1571). They argue that Defendants ignore Interiano's role and stated purposes.

The Court finds that Plaintiffs have failed to establish their claim of intentional vote dilution in Fort Bend County because they have failed to show that mapdrawers acted with a racial purpose as opposed to a partisan

purpose. The district configuration came from the members, including minority Democrat member Reynolds. Though there are precinct splits, Plaintiffs failed to prove that they were racial, and Defendants offered race-neutral explanations for the bizarre shape of HD26. Although Interiano testified that he wanted to keep the Republican districts Republican throughout the decade, there is no indication that he used race to do so.

I. Dallas County

In addition to the one person, one vote claims brought by certain Plaintiffs in Dallas County, Plaintiffs argue that mapdrawers used packing and cracking to dilute minority voting strength, despite the fact that Anglo population declined and all growth in the County was minority growth.[49] Docket no. 1280 at 35-36 ("Areas in the

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[49] For their § 2 results claim, the NAACP offers demonstration Plan H202, with HD107 as a proposed new coalition African-American opportunity district with 23.9% HCVAP and 26.5% Black Alone CVAP using 2005-2009 ACS data. Docket no. 406 at 32; Joint Ex. J-25. This Court's interim plan H309 did not alter the Dallas County configuration, though the current map makes some changes to districts 103 and 115. Thus, this claim remains ripe for determination in the 2013 plan case. The NAACP Plaintiffs offer Fairfax's opinion that the district is reasonably compact, contiguous, respectful of political subdivisions, and capable of being legally enacted by the Legislature. Tr840-41; docket no. 267-1 (Fairfax Supp. Report) at 7. However, on the current record Plaintiffs have failed to show that Plan H202 contains *more* compact minority opportunity districts than Plan H283 in Dallas County. Plaintiffs focus their evidence and briefing on establishing the *Gingles* preconditions for HD107, but fail to demonstrate that sufficient other districts make the preliminary showing and qualify as compact § 2 opportunity districts. To make the comparison required by *De Grandy* when Plaintiffs alter all fourteen districts in a county, as is done here, Plaintiffs must do more than simply point to a single new district that

county where the greatest minority population growth occurred were divided amongst several districts, with heavy minority populations being carved out and added to already existing minority districts.") (citing TrJ1424 (Korbel)). Plaintiffs note that the Anglo population of Dallas County decreased by over 198,000, while the Hispanic population grew by 243,211, the African-American population grew by 73,016, and the Asian population grew by 30,302 (a total of approximately 350,000), yet no new minority districts were created and

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does not exist in Plan H283. Rather, at a minimum, they must show that all of their proposed minority opportunity districts within Dallas County in Plan H202 are reasonably compact districts under *Gingles* and that there are more than in Plan H283. Although they provide population and compactness statistics for their proposed districts, they fail to provide evidence that the minority populations contained therein are compact, taking into account traditional redistricting principles, as is required by the first *Gingles* precondition. Fairfax's report was admitted without objection, but it contains only demographic information concerning the minority population percentages of the districts, various compactness measures of the districts (Reock, Schwartzberg, Polsby-Popper) (including for the districts in Plan H283), district population deviation, contiguity, and county and VTD splits. Fairfax notes that "[t]here are some compactness ratios that measure the dispersion of the district's population" but "[f]or this analysis only the geographic dispersion measurements were calculated." Docket no. 267-2 at 6 n.7; *see also* docket no. 267-1 at 3 n.3). Fairfax concluded that the districts in Plan H202 were all within 10% overall deviation and were contiguous and that Plan H202 "met standard districting criteria and could be adopted by the state legislature." Docket no. 267-2 at 10. This is insufficient to satisfy Plaintiffs' burden under *Gingles*. *Rodriguez v. Harris Cty., Tex.*, 964 F. Supp. 2d 686, 741 (S.D. Tex. 2013) ("[T]he Court finds that the three quantitative metrics of compactness used by Plaintiffs are probative, but not themselves determinative, on the question of compactness.").

"there is some evidence that a minority opportunity seat in the county was lost." Docket no. 1280 at 35 (citing TrJ1423 (Korbel)); docket no. 401 at 9. The Perez Plaintiffs argue that the fact that Anglos are only 33% of the Dallas County population but will control 58% of seats required sophisticated line drawing. Docket no. 401 at 9.

Specifically, Plaintiffs primarily argue that: (1) in western Dallas County, existing Latino districts (HD103 and HD104) were packed (and overpopulated) to waste Latino votes and prevent additional minority opportunity or influence; (2) benchmark HD105 and HD106 were becoming minority-majority districts and .on track to provide minority opportunity, but Anglo population in HD105 was increased so that it could not perform for minorities and HD106 was eliminated; and (3) in northeast Dallas County, significant minority concentration is cracked among five Anglo-dominated districts (107, 112, 102, 113, and 114) to eliminate emerging minority districts and dilute the minority vote.

Defendants acknowledge that although it was a "drop-in county," there was no delegation map, and Defendants state that "Downton therefore worked with several Dallas delegation members to ensure that districts with high SSVR maintained high SSVR" and "worked to protect incumbents to the extent Dallas's population decrease allowed." Docket no. 457 at 70; docket no. 1249-1 at 18-22. Downton testified that because the Dallas County delegation was losing two Republican seats and could not agree on a County proposal, he drew the Dallas County districts, starting with HD103 and HD104, to ensure their SSVR levels remained at benchmark. Defendants contend that "race was a consideration in plan H283 only [to] the extent necessary to comply with the State's legal

obligations." Docket no. 457 at 70. Specifically, they note that changes were made to HD103 and HD104 to respond to Hanna's concerns, and that the configurations of HD104 and HD105 were attributable to partisan and neutral motives (pairing Anderson and Harper-Brown, limiting the number of districts within Grand Prairie) and VRA compliance (maintaining HD104's SSVR over 50% and maintaining HD103's SSVR near benchmark). Docket no. 1249-1 at 20. Defendants contend that no additional Latino and African-American opportunity districts could be drawn while maintaining existing opportunity districts.

The United States asserts that mapdrawers "intentionally prevented the emergence of a Hispanic opportunity district in Dallas County." Docket no. 1279 at 51. The United States notes that due to population changes, HD106 elected the Hispanic-preferred candidate in 2006 and 2008, and HD105 came within 20 votes of electing the minority-preferred candidate in 2008. *Id.*[50] It asserts that the districts showed a strong trend toward electing the Hispanic-preferred candidate, especially in Presidential election years. *Id.* at 51-52. The United States argues that, "[w]ith the additional minority population growth in the area, state officials realized that the minority population had a very real possibility of electing its candidate of choice in 2012, and those officials impermissibly used race to make HD105 in the 2011 Plan more Anglo." *Id.* at 51.[51] The United States contends that

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[50] In the § 5 preclearance litigation, the D.C. Court rejected the claim that HD106 was a lost ability district. *Texas v. United States*, 887 F. Supp. 2d 133 at 175.

[51] The Perez Plaintiffs contend that HD105 can only be explained by racial line drawing. Docket no. 1263 at 5. They assert that, as

mapdrawers reversed the demographic trend in HD105 by increasing Anglo VAP by 5%, which was accomplished by "stretching the district almost the entire length of Dallas." *Id.* at 52. It notes that this demographic change had a corresponding effect in the election analysis, with HD105's election score dropping from 7/9 contests in 2008 to 0/9. Id.; docket no. 1278 FF532.[52]

The Perez Plaintiffs assert that the "manipulation" of HD103, HD104, and HD105 was racial and intentionally frustrated the creation of an additional minority district. Docket no. 401 at 9-11. The Perez Plaintiffs acknowledge that the explanation for the shape of HD105 was the need to pair Anderson and Harper-Brown in a Republican district, but they contend that this intentionally diluted minority voting strength in HD105 and forced Hispanic population into HD104 and that fingers were sent into northwest Irving from HD103 to withdraw Latino population. *Id.* at 9-10 (citing Martin Tr323). They note that HD103 became the most overpopulated district in the County and that overpopulation of these west Dallas districts frustrates the creation of an additional minority district. *Id.* at 10-11.

Similarly, the Perez and the NAACP Plaintiffs contend that making HD105 Anglo required "major

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Korbel explained, HD105 had experienced a drop in Anglo VAP to less than 40%, so to "remedy this," "precinct splits took a long finger of heavily Hispanic blocks (now precincts 4653, 4654, and 4659) to be packed into HD103, and a lightning bolt went into former HD106 to add concentrations of Anglo voters." Id. (citing Perez-133 at 12).

[52] The United States analogizes these facts to what occurred in *LULAC v. Perry*, 548 U.S. at 400. Docket no. 1279 at 52. In *LULAC*, Hispanic voters had not yet elected their preferred candidate within the district, but were poised to do so.

manipulation." Docket no. 1303 at 3. They argue that precinct splits removed heavy Hispanic blocks into HD103 and HD104 and packed them to preserve HD105 as Anglo. They thus contend that HD103, 104, and 105 "manifest racial gerrymandering and minority vote dilution." *Id.*

To the extent Plaintiffs rely on the fact that all the growth in Dallas County was minority and that Anglo population decreased, the Court notes that the CVAP growth was not nearly as high as the total minority population growth. Dallas went from 14.11% HCVAP in 2000 to 19.17% under the 2005-2009 ACS data available to the Legislature (the 2008-2012 ACS data indicates 20.39% HCVAP). D-230, D-218, D-231. Under the 2005-2009 ACS data, though Dallas had a total population of 2,383,125, it was estimated that approximately 423,000 were not citizens. D-218. Further, while the total Hispanic population was estimated at approximately 900,000, only about 550,000 of those were citizens, and only 256,195 were Hispanic citizens of voting age. Nevertheless, two out of fourteen districts (about 14%) remains less than proportional to the HCVAP. Though fairness would seem to indicate that Hispanics be given more districts to achieve proportionality because their population growth prevented the loss of even more districts, mapdrawers were not required to draw Latino districts simply to achieve proportionality.

In that regard, the Court finds that Plaintiffs have failed to prove intentional vote dilution with regard to their cracking claims in northeast Dallas County. Specifically, they have failed to show that mapdrawers acted with an intent other than maintaining their Republican districts or that they used race for partisan

advantage. Because of the high correlation between race and party, splitting Democrats, eliminating Democratic districts, and shoring up districts for Republican incumbents necessarily affects minorities, but that alone is not intentional vote dilution based on race.

The Court does find, however, that Plaintiffs have proven an improper use of race in western Dallas County to dilute Latino voting strength. The configuration of HD103, HD104, and HD105 is undisputably based in large part on race. Downton admitted to using racial shading at the block level to remove Hispanics from HD105 and place them into HD103 and HD104. Downton denies that any use of race was racially discriminatory, however, arguing that the shape of HD105 is governed by the need to pair the residences of Republican incumbents Harper-Brown and Anderson within HD105 and make the district more Republican to ensure that one of them could get re-elected. He further contends that HD103 was drawn in part with Rep. Anchia and that race was used to ensure that its SSVR remained at benchmark levels to avoid retrogression. Although he did not confer with Rep. Alonzo about HD104, he asserts that it was drawn to ensure that its SSVR was above 50%. While these explanations have some superficial truth, the Court finds that the configuration uses race in part in a racially discriminatory manner to intentionally dilute minority voting strength to protect a Republican incumbent in HD105 by intentionally making the district more Anglo.

Mapdrawers and redistricting leadership were hostile to the creation of a new Latino district in Dallas County because they felt it would be a Democrat district and result in the further loss of a Republican seat there beyond the two already required by the lack of growth in

Dallas County overall. With regard to Dallas County, David Hanna expressly stated that they would already be losing two Republican seats but it may get "worse" because they might have to draw a third Latino district, which would mean the loss of a third Republican seat. D-192. Rather than exploring whether any additional minority districts could be drawn or maintained to recognize the population growth, they eliminated districts that were on track to perform for minority voters.

Faced with existing districts 103 and 104 that mapdrawers felt had to be maintained and two Republican districts that had become majority-minority in terms of VAP and were becoming less reliable for Republicans, mapdrawers decided to eliminate HD106, the district that had actually become majority-minority CVAP (using 2008-2012 ACS data, though still Anglo-CVAP majority using 2005-2009 ACS data available to the Legislature) and had elected the minority-preferred candidate in two of five elections. Consistent with their incumbency-protection plan, they paired the Republican incumbents of HD105 and HD106 in a shored-up district. While this could be acceptable partisan gerrymandering (at least under current Supreme Court law), their use of race in doing so renders it impermissible.

Downton shored up HD105 by making it more Anglo (and thus more Republican)—he admitted to splitting precincts to put the Hispanic population into HD104 and HD103 and the Anglo population in HD105. Though he claimed this use of race was only to preserve the SSVR of those districts, the Court finds that this was yet another example of mapdrawers using superficial compliance with the VRA to dilute minority voting strength rather than enhancing it.

Although Hanna had suggested giving thought to raising the SSVR of HD104 above 50%, he also clearly stated that it could be argued that HD104 "will likely perform at 45.6 SSVR since this is similar to the performing level it was drawn at in 2001." D-122. Downton relied on the 50% SSVR threshold in bad faith to waste Latino votes in HD104 because there is no indication that HD104 needed to be at 50% SSVR to continue performing. Further, although HD103 was maintained at benchmark SSVR, there is no indication that mapdrawers thought this was actually necessary for VRA compliance. Downton admitted that he did not think HD103 was an opportunity district (based on his 50% SSVR requirement), and testified that they maintained the SSVR only to "try to stave off any possible legal challenge." Downton 8-31-11 depo. (Joint Ex. J-62) at 97. Jeff Archer had stated that HD103 was not a Latino opportunity district, *see* D-134, and there is no indication that any election analysis was done indicating that its SSVR number needed to be maintained to comply with the VRA or to keep the district performing. Thus, Downton's testimony is not credible.

The Court finds that Downton did not believe that raising the SSVR of HD103 was necessary but he saw it as an opportunity to make HD105 more Anglo and safer for the Republican by placing that Latino population into HD103. Thus, although the use of race was claimed to comply with the VRA, the Court finds that the true motive was to dilute Latino voting strength in west Dallas County by unnecessarily placing Latinos in HD103 and HD104 while simultaneously making HD105 more Anglo to protect the Anglo Republican incumbent who would emerge from the Republican primary.

The Court finds that the § 2 results claims are best addressed in the 2013 plan case. However, the Court finds that mapdrawers improperly used race with an intent to dilute Latino voting strength by wasting Latino votes in HD103 and HD104 and creating a more Anglo HD105 to protect the Anglo Republican incumbent in the general election. This intentional vote dilution in Dallas County violates § 2 and the Fourteenth Amendment.

J. Tarrant County

The Perez and NAACP Plaintiffs cite Tarrant County as an example of intentional vote dilution through intentional minority fragmentation. Docket no. 1263 at 5; docket no. 1303 at 3. The Perez Plaintiffs argue that Plan H283 does not recognize the substantial minority growth in Tarrant County, freezing the number of minority districts at three. Docket no. 401 at 14. They assert "that Districts 90, 93, 95 and 96 reflect racial gerrymander and consequent dilution." Docket no. 1303 at 3. Citing Martin's report and Korbel's report, they contend that Plan H283 minimized minority seats by packing minorities into HD90 and HD95 through bizarre configurations to dilute HD96 (preserving the Republican incumbent) and by creating HD93 as an elongated spike that splintered the minority community. Docket no. 1303 at 3; docket no. 401 at 14.

The configurations of HD93, HD90, and HD95 are indeed bizarre, and Plaintiffs contend their bizarre shape can only be explained by racial gerrymandering. The evidence indicates that the initial County configuration in Plan H113 was a delegation-proposed map, although the two minority-district representatives Veasey and Burnam asserted that they approved of only their own districts.

Although Martin opined that HD90 and HD95 are packed, there is no indication that they were packed at this point. Their Black+Hispanic total population and B+HVAP numbers remained relatively close to and slightly below benchmark, despite the fact that substantial population had to be added to the districts.

Because Hanna raised concerns about the SSVR in HD90 dropping from the benchmark (from 45% to 40% total SSVR) and MALDEF had asserted that its SSVR could be raised over 50%, and because they believed they could "offset" the loss of HD33, Downton and redistricting leadership decided to raise the SSVR of HD90 above benchmark levels to 50.1% (non-suspense), without consulting the representatives of those districts. There is no indication that HD90's SSVR needed to be increased to that level to remain a performing ability-to-elect district.

There is undisputed evidence that mapdrawers manipulated the population based on race, removing some areas and swapping out population to increase the SSVR of HD90 from 40/41.9% in Plan H113 to 47.9/50.1%. There is little indication that they cared about traditional redistricting factors or maintaining communities of interest; they were only concerned with raising the SSVR to 50.1%. The district became the most underpopulated district in the plan. The African-American community of Como was removed from HD90 and placed into a Republican district represented by Anglo Rep. Geren. Other population was swapped between HD90 and HD95, and between HD90 and HD93. Overall, substantial Anglo population was removed (approximately 12,000 total population and 11,000 VAP), while Black+Hispanic total population and B+HVAP was increased.

While at first blush, this appears to be an extreme instance of packing in HD90, the changes cannot be evaluated in isolation. As noted, the African-American community of Como was removed and placed into an Anglo district; this is not packing. Much population was swapped between HD90 and HD95, another minority district. In HD95, substantial Anglo population was added, while substantial minority population was removed, lowering the Black+Hispanic total population percentage as well as B+HVAP. Considering the population changes in HD90 and HD95 together, total population decreased by 4,100 Anglo and 4,200 Black+Hispanic, and voting age population decreased by about 3,600 Anglo and 3,300 B+HVAP. Thus, claims that HD90 and HD95 were packed are not supported by the evidence.

However, increasing the SSVR of HD90 was merely superficial compliance with the VRA, invoked in bad faith to actually undermine Latino voting strength. As discussed, Defendants ignored DOJ guidance that ability to elect was not measured simply by a demographic criterion and claimed that they could "offset" the loss of existing Latino opportunity and ability district HD33 by increasing the SSVR of an existing ability district above 50%, even though they knew this did not create a new ability district. Further, although they did not use the 50% SSVR pretext to pack HD90 and HD95, they did use it to shore up HD93 as an Anglo district. Between Plan H113 and Plan H283, approximately 1,460 Black+Hispanic total population and 830 B+HVAP were removed from HD93 and approximately 435 Anglo total population and 413 Anglo VAP were moved into HD93, increasing the Anglo CVAP from 65.7% to 66.5%. The Court finds that

mapdrawers acted with racially discriminatory intent to dilute Latino voting strength in Tarrant County.

K. McLennan County

MALC, the NAACP Plaintiffs, and the Perez Plaintiffs assert that there was intentional vote dilution in McLennan County.[53] Docket no. 1263 at 4; docket no. 1280 at 34-35. They note that benchmark HD57 was created in the *Graves v. Barnes* litigation, 378 F. Supp. 640 (W.D. Tex. 1974), and the minority community remained intact in that district for almost 40 years, electing the minority candidate of choice, until 2010. Docket no. 1263 at 4 (citing TrJ1442-43 (Korbel)); docket no. 1280 at 34. Benchmark HD57 had become majority-minority in terms of total population, though it remained majority-Anglo CVAP. Perez Plaintiffs and the NAACP Plaintiffs argue that majority-minority HD57 was radically altered and converted to an Anglo-majority district. Docket no. 1303 at 5.

County Commissioner Lester Leon Gibson testified that the minority community had elected their candidate of choice in HD57 from 1998 until the 2010 election, when Anglo Republican Marva Beck won the district. TrJ1828-29 (Gibson). Plaintiffs contend that, to protect that incumbent, mapdrawers removed largely minority areas of Waco from HD57 and replaced them with more Anglo areas (creating a district that was 55.2% Anglo in terms of total population), splitting minority communities of

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[53] Defendants point to the ambiguity in the Perez Plaintiff's live pleading concerning whether they are alleging claims against Plan H283. Docket no. 1272 at 92 n.35. As discussed previously, it was clear during trial and from the Perez Plaintiffs' arguments and post-trial briefing that they are challenging Plan H283.

interest and diluting minority voting strength.[54] Korbel testified that, instead of preserving the majority-minority character of HD57, Plan H283 removed 23,000 people, 70% of whom were minority, and imported 20,000 persons, who were more than 80% Anglo, cracking minority voting strength. TrJ1444 (Korbel); *see also* docket no. 1263 at 4. The Legislature changed the district number to HD12 and took out minority precincts in McLennan and Brazos Counties and added Limestone County. TrJ1443-44 (Korbel); TrJ1841 (Gibson). The Perez Plaintiffs contend that the reconfiguration intentionally cracked and fragmented minority voters to dilute their voting strength. Docket no. 1263 at 4. Korbel testified that the majority-minority character of the district could have been maintained, thus preserving minority opportunity to elect. TrJ1445 (Korbel); *see also* docket no. 1280 (NAACP Brief) at 35.

Defendants contend that Plaintiffs have failed to prove that the districts were drawn with the purpose of diluting any group's voting strength, and that Commissioner Gibson was not familiar with the 2011 House plan and had

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[54] Plaintiffs showed in Plan H363/Plan H367 that the same three districts could be configured in a way that would have created a majority-B+HCVAP district using 2008-2012 ACS data. This district maintains much of the benchmark configuration, including portions of McLennan County and all of Falls and Robertson Counties, but adds a portion of Brazos County including part of the City of Bryan. However, Plaintiffs failed to proffer sufficient evidence showing that the minority community in HD57 is compact, taking into account traditional districting principles. Plaintiffs also offered insufficient evidence of racially polarized voting for McLennan County. Plaintiffs have thus failed to prove a § 2 results claim with regard to Plan H283 but may raise this claim in the 2013 plan case.

not looked at any figures showing whether there was vote dilution. Docket no. 1272 at 93.

Although McLennan County fits the pattern of diluting minority voting strength in districts with significant minority population that had elected a Republican who was not the minority candidate of choice in 2010, Plaintiffs have failed to provide sufficient evidence of racial means or motive to establish an intentional vote dilution claim. It is insufficient to show effects, without evidence demonstrating intent. Coupled with the lack of statistical evidence of racially polarized voting in this County, the lack of evidence of intent leads the Court to conclude that Plaintiffs have failed to prove intentional vote dilution.

L. Bell County

MALC and the NAACP Plaintiffs contend that § 2 required the creation of a minority coalition district in Bell County. MALC, NAACP, and Perez Plaintiffs further contend that Bell County is evidence of intentional vote dilution. MALC's Third Amended Complaint alleges that in Bell County, African-American and Latino population growth exceeded 51.64% and the minority community is geographically compact and politically cohesive in the City of Killeen. Docket no. 897 ¶ 54. MALC contends that Plan H283 "unnecessarily fragments the minority community of Killeen to minimize its political impact on Texas House elections." *Id.* The Perez Plaintiffs also allege intentional discrimination with regard to HD54. Docket no. 960 (Sixth Am. Compl.) ¶ 28.[55]

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[55] Although Defendants again say it is unclear if the Perez Plaintiffs are challenging the 2011 plan in addition to the 2013 plan, the Perez Plaintiffs presented claims against the 2011 plan at trial,

The NAACP Plaintiffs say that the City of Killeen is exceptionally diverse in part because of its unique relationship with Ft. Hood and that, because of its unique interests, it benefits from being kept whole. Docket no. 1280 at 31-32 (citing TrJ1706-7 (Jones)). It was kept nearly entirely whole in the benchmark HD54, with only about 200 individuals from Killeen excluded. TrJ1403 (Korbel). The NAACP Plaintiffs note that the City of Killeen experienced tremendous population growth over the decade, and HD54 was overpopulated. Docket no. 1280 at 32 (citing TrJ1706 (Jones); Tr TrJ1401-2 (Korbel)). MALC, Perez, and the NAACP Plaintiffs further note that, once Burnet County was removed, HD54 was short 13,000 voters, but instead of adding voters to the existing core of HD54, which already contained almost the entire City of Killeen, mapdrawers removed approximately 33,000 voters from Killeen, 2/3 of whom were minority, and added in Anglo voters. Docket no. 1280 at 32 (citing Tr1402-5 (Korbel)); docket no. 1263 at 5. In Plan H283, both HD54 and HD55 are majority-Anglo CVAP and the City of Killeen is split between the two districts.

NAACP Plaintiffs contend that Plan H202 "created a new African American [coalition] opportunity district in

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briefed this claim in their 2014 Post-Trial Brief (docket no. 1263 at 4), and included proposed conclusions of law after the 2014 trial that include HD54 in Plan H283 as having the purpose and effect of minimizing and diluting minority voting strength in violation of § 2 and the 14th Am (docket no. 1265 CL2). The Perez Plaintiffs' joint briefing with the NAACP asserts that HD54 was racially gerrymandered to protect a Republican incumbent by splitting Killeen and fragmenting the minority population using race as a proxy for partisanship. Docket no. 1303 at 4.

Bell County." Docket no. 406 at 33. In 2011, HD54 was proposed as a multi-ethnic minority coalition of 28.7% Black Alone CVAP, 17.7% HCVAP, 3.2% Asian CVAP, and .8% Indian American (46.4% Anglo CVAP) using 2005-2009 ACS data. Joint Map Ex. J-25. Fairfax testified that it would be a majority B+HCVAP district (30.99% BCVAP and 22.3% HCVAP for combined B+HCVAP of 53.29%) in 2014. TrJ912. NAACP Plaintiffs note that Fairfax found it to be a majority-minority district and that it was compact, contiguous, respected political subdivisions, complied with traditional redistricting criteria, and could be adopted by the Legislature. Tr842-43.

Although the NAACP Plaintiffs offered no expert evidence of racially polarized voting specific to Bell County in 2011, they contended that "the statewide analyses performed by Dr. Kousser, Dr. Ansolabahere, and Dr. Lichtman finding racially polarized voting in Texas are all applicable to Bell County," and they also relied on the lay testimony of Phyllis Jones, a long-time resident of Bell County. Docket no. 406 at 34; docket no. 408 at 8. They further noted that districts between 35-45% BVAP and total minority population around 70% are generally effective minority coalition districts, citing congressional districts 9, 18, and 30 as examples. Docket no. 406 at 35. In addition, Defendants stipulated during trial that racially polarized voting exists throughout Texas, other than in Nueces and Kleberg Counties.

Plaintiffs fail to prove that HD54 as drawn in Plan H202 was required by § 2 in 2011. According to the ACS data available to the Legislature, it was not majority-minority-CVAP without combining three or four minority groups, and there is no indication that Plaintiffs had

provided the necessary evidence concerning multi-ethnic cohesion. Thus, the Legislature's intentional failure to create the district was not, standing alone, intentional vote dilution.[56]

However, the evidence does indicate that mapdrawers (specifically Aycock) intentionally racially gerrymandered the districts to dilute the minority vote by moving minority population out of HD54 and moving Anglo population in, thus cracking and diluting the minority vote to ensure Anglo control over both districts. Aycock was not the minority candidate of choice and often voted against NAACP positions. TrJ1703-5 (Jones); TrJ1751 (Aycock). The Perez Plaintiffs note that Killeen is heavily minority, "there has emerged an effective minority political coalition around municipal policies," and that a "minority candidate [Brown] recently ran a reasonably strong campaign against the incumbent," which Plan H283 addressed "by cynically splitting the Killeen minority community." Docket no. 1263 at 4-5; TrJ1705 (Jones); *see also* TrJ1696-97 (Jones) (noting that minority voters had elected their candidate of choice to city council).

Defendants assert that HD54 "was drawn for race-neutral reasons and without a racially discriminatory purpose." Docket no. 1276 CL54. They contend that the Bell County configuration was created by the two members of the delegation (Jimmie Don Aycock (HD54) and Ralph Sheffield (HD55)), that it reflects the "give and take" between them, and that the demographic figures in

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[56] To the extent Plaintiffs offer post-2011 plans and expert evidence of racially polarized voting in 2012 through Dr. Brischetto, those § 2 claims are better addressed in the 2013 plan trial.

H100 and H283 are largely the same. Docket no. 1249-1 at 32-34; docket no. 1272 at 49-51; docket no. 1276 FF145. Defendants note that most of Killeen is in HD54 and that Killeen had been divided in prior plans (and is divided in NAACP Plaintiffs' proposed Plan H202), that minority CVAP increased in HD54 and Anglo CVAP decreased from 59.4% to 56.1%, and that Aycock testified that he felt that Lampasas County had more in common with Killeen than Temple and Belton (TrJ173-34). Defendants argue that, as drawn in Plan H283, "the Bell County House districts reflect the goals identified by Representative Aycock and they do not diminish minority voting strength." Docket no. 1272 at 51.

After the loss of Burnet County due to the population increase, Reps. Aycock and Sheffield were limited in their district configurations. Rep. Aycock drew the lines and "knew where the voters were and where [he] wanted to draw those lines." TrJ1755 (Aycock). Aycock wanted more "Republican" areas and he knew that a minority coalition district would not likely have enough Republicans to re-elect him. TrJ1741-44, TrJ1769 (Aycock). Aycock drew the district to split the City of Killeen and the minority community. Although plans were introduced during the session (such as Plan H202 and Plan H232) that would have kept the City of Killeen more whole in one district, these plans were rejected, and Aycock testified it was because Lampasas County was more aligned with western Bell County than with Temple/Belton, so it was beneficial for them to remain in a district with Killeen.

As noted in the fact findings, the Court does not find this testimony credible. Aycock also objected to plan H201 because it had a "land bridge" joining Killeen with Temple

and Belton, though he admitted that Plan H283 includes land bridges in other areas and he voted for it. This again indicates that Aycock's objections to minority-proposed plans were pretextual. Further, the fact that Anglo CVAP decreased in HD54 was due to the fact that minority population growth accounted for more than 70% of the growth in Bell and Lampasas Counties and the exclusion of more Anglo Burnet County. The Court finds that the decision to split Killeen and the minority community within it was to ensure that HD54 and HD55 remained Anglo-majority, and would reelect Republican incumbents. Minority communities were removed and Anglo areas were moved in, which made it more difficult for minority voters in HD54 to elect their candidate of choice.

Plaintiffs presented some lay testimony of minority cohesion through Phyllis Jones of Killeen.[57] Dr. Brischetto found racially polarized voting in the 2012 elections in Bell County. Thus, splitting the minority community was an effective way to dilute the minority vote and ensure that the bloc-voting Anglo majority would defeat minority-preferred candidates. The Court thus finds evidence of intentional vote dilution in Bell County in violation of § 2 of the VRA and the Fourteenth Amendment.

M. Midland/Ector Counties

MALC contends that a new Latino opportunity district was required in Midland and Ector Counties. Defendants assert that, under the 2010 census, both Midland and Ector Counties were entitled to the same

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[57] Jones also testified that minority voters are sometimes faced with lack of translators or more rigorous questioning about ID. TrJ1699-1703.

number of districts (0.8) as in 2000, so the configuration in this area is largely unchanged. Docket no. 1249-1 at 37. Following the County Line Rule, the two districts in Plan H283 are composed of whole counties—HD81 contains Andrews, Winkler, Ector, and Ward Counties, while HD82 contains Dawson, Martin, Midland, Crane, and Upton Counties. No party has asserted that a Latino opportunity district could be drawn in this area utilizing whole counties and respecting the County Line Rule. MALC proposes a new Latino opportunity district (HD81) in this area in Plan H205, Plan H295, Plan H329, and Plan H360, all of which involve County Line Rule violations.

In Plan H205, proposed HD81 splits Midland and Ector Counties (along with the cities of Midland and Odessa) and joins them with six whole counties to the west plus an odd-shaped extension into Winkler County that splits the cities of Kermit and Monahans. Excising the Hispanic populations from four cities and towns spread across three counties does not respect political subdivisions. These Hispanic populations are not compact, taking into account traditional districting principles, and appear to be joined based solely on their race.

In Plan H295's HD81,[58] Midland and Ector Counties are again split, along with the cities of Midland and Odessa, and these partial counties are joined with six whole counties and a bizarrely shaped extension into Tom Green County excising a cross-section of the City of San Angelo and dividing it into three pieces. This plan suffers the same deficiency as Plan H205, but in this case the

[58] Plan H296 has the same proposed HD81.

Hispanic populations of Midland and Odessa are excised and joined with the Hispanic population in San Angelo several counties over. MALC has failed to show that the Latino community contained in HD81 is compact, taking into account traditional districting principles.

MALC has failed to satisfy the first *Gingles* precondition for its plans presented during the 2011 legislature and 2011 trial phase of this case.[59] The Court also finds that the Legislature's failure to create these proposed districts in 2011 was not intentional vote dilution.

N. Lubbock County

MALC contends that an additional Latino opportunity district was required in Lubbock County and the surrounding areas. In the benchmark plan, HD84 was centered in the City of Lubbock, though it did not encompass all of Lubbock and included areas to the north and east beyond the city limits. The remainder of Lubbock in the southwest and the rest of the County was placed in HD83 and joined with other counties. In Plan H283, all of HD84 is located within the City of Lubbock. The rest of the City and County is joined with almost all new counties (except for Gaines County) in HD83.

The idea of creating a Latino opportunity district based in part in Lubbock was presented to the Legislature via MALDEF's Plan H115. That plan creates a long, bizarre district that connects two whole counties with parts of nine of other counties. No party offers this plan as a demonstration plan, but Figueroa testified

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[59] MALC also offered Plan H329 and Plan H360. The Court finds that the § 2 results claims based on these plans are best addressed in the 2013 plan trial.

before the Legislature that this plan was drawn in part to "see if Latinos were being split because of the county line rule." D-595 at 74. The proposed district not only snakes through various counties but splits numerous cities (including Amarillo, Hereford, Dimmitt, Plainview, Littlefield, and Slaton) in addition to dividing the City of Lubbock into three districts to reach 51.6% HCVAP. When asked how this map showed respect for political subdivisions, Figueroa responded that it did not split VTDs and that it drew "as many counties as we could whole" though he acknowledged that only two of ten counties are whole in HD87. D-595 at 16-17. The shape of Plaintiffs' proposed district suggests that it is not the County Line Rule, but the dispersion of the Latino population that is responsible for the lack of a Latino opportunity district in this area.

MALC offers Plan H205, which was also introduced during the 2011 legislative session, with proposed HD84 (53.3% HCVAP) that excises the middle of the City of Lubbock and joins it with all of Crosby County and parts of twelve more counties stretching north and south in a bizarrely shaped, convoluted district. Defendants argue that HD84 violates the County Line Rule eleven times, is clearly drawn based on race, and has compactness scores that are two times higher (*i.e.*, worse) than any of the district scores in Plan H283. Docket no. 457 at 29 (citing Joint Ex. J-26, Giberson Report (Ex. E-18) at 7-8); docket no. 645 at 16.

Like in Plan H115, HD84 splits the City of Lubbock among three districts, and splits numerous other cities such as Littlefield, Tulia, Dimmitt, Hereford, Amarillo, Brownfield, and Lamesa. It has low compactness scores

and in fact appears "irrational on its face." Again, the shape of the proposed district suggests that the Latino population in West Texas is too dispersed to be considered compact, and is not compact taking into account traditional redistricting principles such as respect for political subdivisions. *See Shaw v. Reno*, 509 U.S. 630, 651-52 (1993) (noting that it is "permissible for a State, *employing sound districting principles such as compactness* and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous *and whose residential patterns afford the opportunity* of creating districts in which they will be in the majority.") (quoting *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 168 (1977) (emphasis in *Shaw*)).

A district that includes "individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Shaw*, 509 U.S. at 647. "It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls" and such "impermissible racial stereotypes" have been rejected. *Id.* MALC has not proffered sufficient evidence to demonstrate that the populations included in this proposed district were included for reasons other than their race. Thus, MALC has failed to satisfy the first

Gingles precondition for its plans presented during the 2011 legislature and 2011 trial phase of this case.[60] The Court further finds that the Legislature's failure to draw this proposed district in 2011 was not intentional vote dilution.

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[60] During the 83rd legislative session in 2013, MALC offered Plan H329 with HD88 in Lubbock County. Docket no. 1273 at 12; MALC-100. HD88 has 47.2% HCVAP using 2005-2009 ACS data and 50.9% HCVAP using 2008-2012 ACS data. D-322; MALC-102. MALC asserts that HD88 is "reasonably compact, split only the same county already split under H283 in Lubbock, and brought together a cohesive Hispanic population to provide an opportunity for electoral success." Docket no. 1273 at 12. The Court finds that the results claim based on Plan H329 is best addressed in the 2013 plan case.

However, the Court notes that MALC's focus on comparing compactness scores in its proposed plans with those in the enacted plan is misplaced. MALC argues throughout its briefing that where its proposed districts are comparably compact or more compact than enacted districts, that shows compactness and/or that MALC did not ignore traditional districting principles. *E.g.*, docket no. 459 at 14; docket no. 1273. Whether a district is compact for § 2 purposes is not determined by comparing the district's compactness score to districts in the enacted plan, which is unquestionably politically gerrymandered. Rather, "§ 2 embodies its own requirement of compactness" regardless of whether the state has drawn compact districts. *Diaz v. Silver*, 978 F. Supp. 96, 130 (E.D.N.Y. 1997). Thus, MALC must offer evidence demonstrating that the minority population within its proposed district is compact, taking into account traditional districting principles. In that regard, although demonstration districts are drawn with a focus on achieving a 50% HCVAP, are not required to have the "least possible amount of irregularity," and are not necessarily the district that must be implemented by the State, it is not enough to draw a district solely by gathering in Hispanic population and then asserting that the included Hispanics share some interests in common.

O. Statewide and totality of circumstances

The Task Force asserts that Plan H283 systematically thwarts Latino opportunity wherever it could have been added and has an overall discriminatory effect on Latinos which, in the face of overwhelming population growth, is circumstantial evidence of discriminatory intent. Docket no. 1282 at 26-27. The Task Force points to the strong racial tension and heated debate about Latinos, Spanish-speakers, undocumented immigrants, and voter ID legislation. *Id.* at 29. Flores observed the session and testified that it was the most racially acrimonious he had ever seen. Tr436. The Task Force Plaintiffs further note the rushed process with limited opportunity for public input and the failure to employ proper VRA standards (such as focusing solely on 50% SSVR) or examine § 2 compliance. Docket no. 1282 at 47-50. They argue that redistricters took away opportunities where Latinos were about to oust Republican incumbents in HD78 and HD117 and that Plan H283 disadvantages Latinos to bolster the re-election chances of those incumbents, who were not the Latino candidates of choice. Docket no. 1282 at 66.

The Perez Plaintiffs and their expert Ed Martin contend that mapdrawers and redistricting leadership utilized three main techniques to intentionally dilute the minority vote in Texas to protect Anglo Republican incumbents. These techniques include: (1) packing existing minority districts to prevent the creation of new minority districts by using an arbitrary 50% SSVR standard (except in HD78 where it would have negative consequences for the Republican incumbent); (2) cracking the burgeoning minority population to eliminate effective minority coalition districts; and (3) using population

deviations.[61] Joint Expert Ex. E-5 (Martin report) at 3. By using these techniques, Martin opined that Plan H283 actually reduced the number of effective minority districts[62] by at least five and up to eight districts, despite the massive minority population growth. *Id.* at 4. In contrast, the Perez Plaintiffs argue, Plan H232 contained the same number of County Line Rule violations (one) as Plan H283 yet created at least nine, and possibly twelve, more minority districts than Plan H283. *Id.*

The Court agrees that the overall configuration of Plan H283 is the product of intentional vote dilution. The evidence of the mapdrawing process supports the conclusion that mapdrawers were motivated in part by an intent to dilute minority voting strength. Discussions among mapdrawers demonstrated a hostility to creating any new minority districts, as those were seen to be a loss of Republican seats, despite the massive minority population growth statewide.

Although delegations worked on their respective areas, the overall map was drawn in secret, with no one seeing the statewide map until Plan H113 was released on Wednesday, April 13. Mapdrawers intentionally paid li[illegible]le attention to § 2 compliance, believing that minority members in delegations would ensure VRA compliance, but the member-driven process and the limited role of

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[61] Plaintiffs bring *Larios*-type one person, one vote claims based on the population deviations, and these claims are discussed below. However, as mentioned above, certain Plaintiffs also rely on the population deviations as evidence of intentional vote dilution under § 2 of the VRA.

[62] Martin defined an effective minority district as one with less than 50% Anglo VAP that had performed for minority voters in the past. Joint Expert Ex. E-5 at 4.

minority members in Harris County were not conducive to compliance. After Plan H113 was released on April 13, the process was extremely rushed, with public hearings on Friday, April 15 and Sunday, April 17, and the plan voted out after the HRC meeting on Tuesday, April 19 (with new Plan H134 released the day before). Few changes were made and no minority opportunity was added. When faced with the fact that the number of opportunity districts had decreased, redistricters chose to artificially inflate the SSVR in existing ability districts HD90 and HD148 to claim nonretrogression and to thwart claims that additional opportunity districts were required, even though they had no reason to believe that doing so was required by § 2 or § 5.

Despite the massive minority population growth, Plan H283 not only failed to create any new minority opportunity districts, it *reduced* the number of minority opportunity districts by eliminating HD33 in Nueces County. Redistricters also intentionally disadvantaged Hispanic voters in Hispanic districts that had elected Republicans in 2010 who were not Latino candidates of choice; they used race impermissibly and intentionally diluted Latino voting strength in HD78, HD117, and HD41 to protect Republican incumbents who were not Latino candidates of choice. The impact of the plan was certainly to reduce minority voting opportunity statewide, resulting in even less proportional representation for minority voters.

Given the existence of racially polarized voting throughout Texas and the evidence of the various *Arlington Heights* factors (incorporated from the fact findings and the Court's Opinion on Plan C185), as well as the totality of circumstances, the Court finds invidious

discriminatory purpose underlies Plan H283. As discussed in the Court's Opinion on Plan C185, it is not necessary for the Court to find that mapdrawers or redistricters acted with actual racial animus or hostility. Rather it is sufficient that redistricters acted to undermine minority voting strength for partisan advantage. Further, although various mapdrawers drew different portions of the map, they did so with authority from the Legislature, and thus their motives, knowledge, and intent must be imputed to the Legislature when it enacted the plan. Thus, Plaintiffs have shown that, with regard to the various specific regions in which this Court has found intentional vote dilution, as well as statewide, redistricters acted at least in part with a racially discriminatory motive and intended to dilute minority voting strength in violation of § 2 of the VRA and the Fourteenth Amendment.

III. *Shaw*-type racial gerrymandering claims

In response to this Court's request for briefing on claims after the *Alabama LBC* opinion was issued, MALC argued that it asserted *Shaw*-type racial gerrymandering claims because it alleged "racial gerrymandering" in its Third Amended Complaint. Docket no. 1306. MALC asserts that it has alleged racial gerrymandering claims to districts 26, 34, 41, 54, 77, 78, 103, 104, 105, 117, and 148. However, the Court finds that MALC did not sufficiently plead a *Shaw*-type racial gerrymandering claim, and that its racial gerrymandering claims are only asserted in the context of intentional vote dilution claims.

The Perez and NAACP Plaintiffs asserted a number of "racial gerrymandering" claims related to districts in Dallas County, Tarrant County, Harris County, Bell

County, McLennan County, Fort Bend County, and joined with MALC in its challenges to Bexar and Nueces Counties and HD41. Docket no. 1303. However, again the Court finds that these claims were phrased in terms of intentional vote dilution, not *Shaw*-type racial gerrymandering claims.

The Task Force Plaintiffs assert that they have alleged *Shaw*-type racial gerrymandering claims against HD117 in Bexar County and "House districts in El Paso County" in Plan H283. Docket no. 1308 at 2. Their current pleading, the Fourth Amended Complaint (docket no. 891 ¶37), alleges that mapdrawers used race as a predominant factor to allocate Latino voters into and out of HD117 and across districts in El Paso County. These claims are brought in addition to their intentional vote dilution racial gerrymandering claims.

Defendants concede that the Task Force Plaintiffs have alleged *Shaw*-type claims with regard to HD117 and the "El Paso districts" but assert that they lack standing to bring the claim against HD117 because they failed to prove that any member of the association resides in the district. The evidence[63] indicates that (1) one named Plaintiff (Sergio Coronado) resides in HD78 in Plan H283; (2) one named Plaintiff (Socorro Ramos) resides in HD75 in Plan H283; (3) one named Plaintiff (Armando Cortez) resides in HD119 in Plan H283; (4) Latino registered voter members of HOPE and MABA reside in HD117 in Plan H283; and (5) Latino registered voter members of

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[63] As discussed in the congressional plan opinion, the Task Force Plaintiffs' motion to supply evidence concerning the residences of its members is granted and the information is filed under seal.

HOPE and MABA reside in HD77 in Plan H283.[64] Docket no. 1314. This is sufficient to establish standing for the *Shaw*-type claims asserted against HD117 in Bexar County and against HD75, HD77, and HD78 in El Paso County.

The Task Force Plaintiffs rely on both district-specific and statewide evidence to support their *Shaw*-type claims focused on HD117 and El Paso. Docket no. 1308 at 4. In terms of statewide policies focusing on race, they point to evidence that "Texas redistricters mechanically applied a strict threshold of 50% SSVR statewide to measure compliance with section 5, despite the State's awareness that the U.S. Department of Justice did not mechanically apply a demographic threshold to evaluate retrogression." Docket no. 1308 at 5. They argue that "Texas redistricters insisted that districts be drawn with greater than 50% SSVR in order to count as ability to elect districts in the State's retrogression analysis." *Id.*[65] The Task Force Plaintiffs contend that the *Alabama LBC*

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[64] Although the Task Force asserts that these individuals reside in "the antler," a search of the addresses indicates that they actually live in the "head" of HD77.

[65] The Task Force Plaintiffs note that redistricters increased the SSVR of HD90 and HD148 over 50% in Plan H283 to count them as additional Latino districts in the retrogression analysis, even though they were already Latino ability-to-elect districts. Docket no. 1308 at 5-6 (citing Post-Trial Brief at 58-59). The Court notes that although several parties complain about the State's increase of SSVR in HD90 and HD148 (and the Task Force uses this to support its assertion that redistricters used 50% SSVR as a metric), no party asserts a *Shaw*-type claim directly against these districts. In this context, they point to those districts as further evidence of mapdrawers' view of the importance of having SSVR above 50% in certain districts.

decision made clear that mechanical quotas are not the measure of ability to elect or retrogression.

A. HD117

The Task Force Plaintiffs argue that "Texas's mechanical 50% SSVR test to claim non-retrogression . . . drove redistricters to use race as the predominant and controlling factor in crafting HD117." Docket no. 1308 at 7. They further note that Texas claimed in its post-trial brief that it drew HD117 "to comply with the Voting Rights Act by maintaining the district's SSVR over 50%." *Id.* at 5 (citing Post-Trial Brief (docket no. 1272) at 55).

It is undisputed redistricters determined that HD117 had to maintain an SSVR above 50%. The evidence further indicates that incumbent John Garza and redistricters also determined that it would not exceed 50.1% SSVR. The Task Force Plaintiffs note that Interiano explained that he had to perform a careful balancing act in RedAppl, shading for SSVR and using election results to craft the final HD117. Docket no. 1308 at 7. The Task Force Plaintiffs contend that "[t]he State's mechanical use of the 50% SSVR standard to claim non-retrogression contorted the redistricting process by making race a predominant factor and led redistricters far afield of traditional redistricting considerations in crafting . . . HD117." *Id.* at 8.

Plaintiffs argue that redistricters also used race, Latino registration and electoral data to swap territory into and out of HD117 to create the district as Latino majority but not likely to elect the Latino candidate of choice; they achieved their 50.1% SSVR goal, yet Latino performance dropped when compared to benchmark. The Task Force argues that Garza's racial statements and

Interiano's method of swapping territory in and out of the district while striving for exactly 50.1% SSVR constitute direct evidence of the use of race as a predominant factor when crafting the district. Id. at 11.

The first step in a *Shaw*-type racial gerrymandering claim analysis is determining whether traditional redistricting principles were subordinated to race. The Court finds that Plaintiffs have made this showing with regard to HD117. Defendants admit, and the evidence is clear, that Defendants believed that maintaining the district above 50% SSVR was essential to avoid retrogression. However, they refused to draw a district that included any more than 50.1% SSVR. Maintaining this particular racial datapoint for the district was the dominant factor used by redistricters in deciding which population to include within or without the district, indicating that racial criteria predominated. Further evidence that race predominated is that Interiano's other explanations for why certain territory was included or excluded were not credible, leaving racial criteria as the primary explanation.

The Court thus considers whether this use of race served a compelling state interest. The Court finds that it did not because, although race was used to reach the 50.1% SSVR target set by redistricters, race was not used to further compliance with the VRA. Rather, redistricters insisted that the district not only have exactly 50.1% SSVR but that it also perform less favorably for Latino voters. Redistricters would not accept Farias's proposed amendment that created an HD117 with 50.1% SSVR but would also maintain Farias's representative-constituent relationship with Whispering Winds and Somerset. Solomons' objections–that it created jagged and awkward

lines and increased the number of split precincts–were pretextual, given that these criteria had not been used to draw the map or reject other proposals, and other districts drawn by Solomons' mapdrawers (such as the HD77/HD78 border and HD41) had more split precincts. Solomons rejected the proposal because maintaining the racial quota *while at the same time ensuring the least possible Hispanic opportunity* was paramount. Accordingly, redistricters lacked a compelling state interest for their use of race.

The Court thus finds that the Task Force Plaintiffs have established a *Shaw*-type racial gerrymandering claim with regard to HD117.

B. HD77 and HD78 in El Paso

The Task Force Plaintiffs point to the fact that in El Paso, Downton used block-level racial data while mapping, and they argue that mapdrawers subordinated traditional redistricting criteria by splitting precincts (Downton split 14 along the HD77/78 boundary). The Task Force Plaintiffs further point to the fact that in places where it employs race-based redistricting, Plan H283 splits precincts, divides communities of interest, and does not protect partisan interests, flaunting traditional redistricting criteria. Docket no. 1308 at 14.

Defendants assert that race did not predominate in the configuration of the El Paso County districts and "the basic configuration of the districts was determined by the El Paso delegation, and the evidence shows that Representative Marquez drew HD77 (including the so-called 'antlers') to maintain its partisan character and to increase her chances of re-election." Docket no. 1310 at 17 (citations omitted). Defendants further contend that

Downton modified the El Paso delegation's proposed districts to increase SSVR in HD78 based on a specific concern raised by Hanna.

The Court finds it to be a close question whether race predominated in the allocation of persons within and without HD78. While the initial configuration of the district was not race-based, there is clear evidence that Marquez modified HD77 and HD78 to assign high-SSVR precincts to her district HD77, and that Downton made further race-based changes to then increase the SSVR in HD78. While the Court finds both uses of race to be unjustified, the Court does not find that race predominated in the drawing of the districts as a whole. Accordingly, the Court finds that the Task Force has failed to establish this *Shaw*-type claim.

IV. One Person, One Vote Claims Based on Population Deviation ("*Larios* Claims")[66]

A. Background

Several plaintiffs allege that specific areas and districts in Plan H283 violate the one person, one vote principle because of systematic underpopulation of majority-Anglo districts combined with systematic overpopulation of majority-Latino districts in urban areas, indicating a discriminatory intent that weakens the

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[66] As noted above, several Plaintiffs bring these claims under the Equal Protection Clause as violations of the one person, one vote principle. However, they also (as does the United States) incorporate the use of population deviations into their intentional vote dilution claims under § 2 and the Fourteenth Amendment. To limit redundancy, the Court has largely limited the population deviation analysis to the one person, one vote claims except where necessary to the analysis of the intentional vote dilution claims.

strength of votes in the overpopulated districts and systematically disadvantages minority districts. These challenges are brought primarily in reliance on *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *summarily aff'd* 542 U.S. 947 (2004), in which a three-judge panel for the Northern District of Georgia invalidated two Georgia plans with top-to-bottom deviation of less than 10% because they violated the one person, one vote principle. LULAC and the Perez plaintiffs assert similar challenges of this sort, as does MALC. The nature of these claims, and precisely what they challenge, is discussed later.

The court will first describe the general, top-to-bottom deviation in Plan H283 for context and background. Then, the court will summarize the governing legal standards for *Larios*-type one person, one vote claims, which will include a discussion of the legal nature of *what* these claims challenge from a geographic point of view and whether Plaintiffs have standing to bring these claims. Finally, and most importantly, the court will analyze whether the population deviations in Plan H283 are explained by legitimate legislative policies in ways that justify the challenged deviations.

B. Plan-wide deviation in Plan H283

Ideal population for single-member district plans is the total state population divided by the total number of districts. For the Texas House, ideal population of a district based on the 2010 Census is 167,637. HD90 in Tarrant County is the smallest district in Plan H283, with a deviation of -4.90% and population 8,209 below the

ideal.[67] D-109 at 27, 34. HD61 in Parker and Wise Counties is the largest district in the Plan, with a deviation of 5.02% and population 8,417 above the ideal. *Id.* at 27, 32. Therefore, Plan H283 has an overall population deviation of 9.92%.[68] *Id.* at 27.

Martin gave Plan H283 an "F" on good-faith effort to minimize deviation, pointing out that there are fourteen counties with two or more whole districts contained within them, and they account for 93 of the 150 districts. Tr379-81. These 93 districts could have been drawn with zero or minimal population deviations. Tr380. Yet eight of the fourteen counties (accounting for 75 districts) have a total deviation over 3.5% from the county ideal. Tr380, Tr383.

Kousser testified that Plan H283 was "not very compliant" with the one person, one vote principle and that "the population disparities are clearly correlated with partisanship and ethnicity." Tr248-49. He found that population deviations, which were greater in Plan H283 than in the benchmark, were not justified by any legitimate reason and heavily burdened Latinos. Tr249, Tr313. In support of his conclusions, Kousser provided a statistical analysis of the Plan. He stated that if the Legislature had been trying to minimize deviations, a histogram of population deviations would have resembled

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[67] A district's deviation percent from the ideal is its relative deviation, and is measured by dividing the absolute deviation of the district from the ideal by the ideal population.

[68] "Overall population deviation is the difference in population between the two districts with the greatest disparity. Average population deviation is the average of all districts' deviation from perfect one-person, one-vote allocation." *Abrams v. Johnson*, 521 U.S. 74, 98 (1997). The difference between -4.90% and 5.02% is the total deviation—9.92%.

a normal curve, with the largest number of districts clustered around zero deviations. Tr233. Instead, he noted, it is more U-shaped, with the largest number of districts between four and five percent underpopulated (23 districts) and four and five percent overpopulated (20 districts). Joint Expert Ex. E-2 at 61-66. Plan H100 only had 37 districts with deviations over 4%. *Id.* at 62-63.

Turning to the racial aspects of his conclusions, Kousser stated that Anglo-majority districts are more underpopulated than overpopulated and Latino-majority districts are primarily overpopulated: 34/80 Anglo districts are overpopulated and 46/80 are underpopulated, while 22/37 Latino districts are overpopulated and 15/37 are underpopulated. Tr234; Joint Expert Ex. E-2 at 64-65. Five of these 15 underpopulated Latino districts, however, are contained in El Paso County, a drop-in county that as a whole is underpopulated, which forces all of its districts to be underpopulated. Tr235; Joint Expert Ex. E-2 at 64. Not counting El Paso County, Latino districts are underpopulated at a rate of 31.25% (10/32) while Anglo districts are underpopulated at a rate of 57.5% (46/80); there are more than twice as many overpopulated Latino districts (22) as underpopulated ones (10). Tr235; Joint Expert Ex. E-2 at 64.

In addition, Kousser noted irregularities in urban districts, both Republican and Democrat, but opined that these irregularities were more severe in urban Democrat districts and were worst in urban Democrat Latino districts. Tr235-37. In terms of urban Republican districts, 19 were overpopulated and 15 were underpopulated, with an average deviation of .47%. Joint Expert Ex. E-2 at 66. Urban Democrat districts were overpopulated at approximately the same rate (22

overpopulated, 17 underpopulated), but the deviations were more severe at .94%. *Id.* And, as noted, Urban Democrat Latino districts fared the worst—13 were overpopulated compared to only 6 underpopulated, with an average deviation of 1.17%. *Id.* Almost all districts represented by Latino Democrats were overpopulated. Tr236. Kousser found no pattern to explain the deviations in urban Republican districts, but found a bias towards overpopulation in urban Democrat districts. *Id.* He noted that this pattern demonstrates the Legislature's partisan and racially discriminatory intent. Joint Expert Ex. E-2 at 67.

Dr. Arrington opined that usually the population deviations in a districting plan would be unimodal, with most of the population deviations clustering near the ideal population, but that was not true in Plan H283. US-355 at 7. He added that when use of the County Line Rule is taken into account, there is no statewide, systematic overpopulation of minority districts. TrJ182. In spite of this statewide conclusion, Arrington pointed out specific instances of population deviation in Dallas, Harris, and Hidalgo Counties that he felt exemplified racially discriminatory effects that must have been intentional. US-355 at 10-13; TrJ222.

Defendants' expert, Dr. Alford, provided contrary testimony. He did not think that a unimodal distribution around zero would occur if redistricters started with existing districts and modified them based on new populations, rather than starting from scratch. TrJ1887-88. This, he said, was because mapdrawers were redistributing population along county lines and preserving constituency representational relations. TrJ1888-89. Alford pointed out that both Anglo and

minority districts in Plan H283 have a bimodal pattern, indicating that population equality was balanced against other redistricting interests. TrJ1890.

Alford also analyzed the average deviation of Anglo districts compared with that of minority districts based on CVAP. TrJ1868-71. He found that the average minority district is overpopulated by 232 persons and that the average Anglo district is underpopulated by 124 persons. TrJ1870. Using SSVR, he found that districts with SSVR above 50% were undersized by 242 and districts with SSVR below 50% were oversized by 63. *Id.* In the context of an ideal district size of approximately 168,000, Alford found all of these deviations to be quite minor. TrJ1871.

C. Applicable law of a *Larios* violation of the one person, one vote principle

1. Background

"The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Gray v. Sanders*, 372 U.S. 368, 381 (1963). Over time, the Supreme Court and lower courts have spoken extensively on this principle, violations of which are justiciable through the Fourteenth Amendment's Equal Protection Clause. *Baker v. Carr*, 369 U.S. 186, 237 (1962). In short, the theory behind the principle is that "the vote of any citizen [must be] approximately equal in weight to that of any other citizen in the State." *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). As alleged here, this principle is violated because some districts are underpopulated compared to ideal (giving voters in those districts greater say in electing a representative) and others are

overpopulated compared to ideal (diminishing the value of a vote in these districts). "Simply stated, an individual's right to vote . . . is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Id.* at 568.

Reynolds v. Sims set forth the backdrop for one person, one vote claims, holding that, "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.* Recognizing that "[m]athematical exactness or precision is hardly a workable constitutional requirement," *Reynolds* did not require "identical number[s]," but rather "an honest and good faith effort to construct districts, in both houses of [a state's] legislature, as nearly of equal population as is practicable." *Id.* at 577. Otherwise, *Reynolds* provided scant guidance, leaving room for future courts to determine how much deviation is permissible, how to allocate the burden of proof on these questions, and which reasons justify a deviation of a certain size.

Reynolds did, however, provide two points of guidance. First, it described the reasons that might justify some deviation from the ideal as "legitimate considerations incident to the effectuation of a rational state policy." *Id.* at 579. Second, it noted that a higher deviation is permissible in state legislative districts than congressional districts because state legislative districts outnumber congressional districts. *Id.* at 577-78. Because the challenges here are made to Texas House districts,

this pronouncement from *Reynolds* guides the Court's analysis.

2. Burden of proof

i. early cases — the 10% threshold

Moving past *Reynolds*, the Court later stated that "minor deviations from mathematical equality among state legislative districts are insufficient to make out *a prima facie case* of invidious discrimination under the Fourteenth Amendment *so as to require justification by the State.*" *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973) (emphasis added). Relying on *Reynolds*, the Court recognized the importance of factors aside from strict adherence to a 0% deviation, noting that "[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement." *Id.* at 749.

Having established that strict population equality would yield to other legitimate reapportionment considerations, the Supreme Court began to provide more specificity concerning what constituted a "minor" deviation. In *White v. Regester*, 412 U.S. 755, 764 (1973), the Court held that plaintiffs challenging a Texas House plan with a total deviation of 9.9% did not "satisf[y] the threshold requirement of proving a prima facie case of invidious discrimination under the Equal Protection Clause." The Court recognized, however, that it was "[v]ery likely [that] larger differences between districts would not be tolerable without justification 'based on

legitimate considerations incident to the effectuation of a rational state policy.'" *Id.* (quoting *Reynolds*, 377 U.S. at 579). Later, the Supreme Court found that deviations of 16.5% and 19.3% "can hardly be characterized as de minimis" and that they therefore "substantially exceed the 'under 10%' deviations the Court has previously considered to be of *prima facie constitutional validity* only in the context of legislatively enacted apportionments." *Connor v. Finch*, 431 U.S. 407, 418 (1977) (citing *Gaffney*, 412 U.S. 735 (1973) and *Regester*, 412 U.S. 755 (1973)) (emphasis added). Accordingly, the Court in *Finch* stated that "a legislatively crafted apportionment with deviations of this magnitude could be justified only if it were 'based on legitimate considerations incident to the effectuation of a rational state policy.'" *Id.* (quoting *Reynolds*, 377 U.S. at 579).

This line of cases culminated in *Brown v. Thomson*, 462 U.S. 835 (1983). There, the Court explicitly stated the numerical point at which population deviations are treated differently by the one person, one vote principle: "Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, *creates a prima facie case of discrimination* and therefore must be justified by the State." *Id.* at 842-43 (emphasis added).

ii. Larios v. Cox

(1) Three-judge panel opinion

In *Larios*, a three-judge panel of the Northern District of Georgia struck down two Georgia plans with

less than 10% deviation because they violated the one person, one vote principle. The court held that

> Georgia's state legislative reapportionment plans plainly violate the one person, one vote principle embodied in the Equal Protection Clause because each deviates from population equality by a total of 9.98% of the ideal district population and there are no legitimate, consistently applied state policies which justify these population deviations. Instead, the plans arbitrarily and discriminatorily dilute and debase the weight of certain citizens' votes by intentionally and systematically underpopulating districts in rural south Georgia and inner-city Atlanta, correspondingly overpopulating the districts in suburban areas surrounding Atlanta, and by underpopulating the districts held by incumbent Democrats.

Larios, 300 F. Supp. 2d at 1322.

Before analyzing the differences for these population deviations, the Court set forth the applicable burdens of proof, with heavy reference to *Brown v. Thomson* and the cases before it. The court stated that "state legislative plans with population deviations of less than 10% may be challenged based on alleged violations of the one person, one vote principle," but the 10% threshold "serves as the determining point for allocating the burden of proof" in such a challenge. *Id.* at 1340 (quoting *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996)). The court focused on the Supreme Court's repeated use of the phrase "prima facie"

in the *Brown* line of cases to indicate that 10% "is not a safe harbor":

> Had the [Supreme Court] intended to foreclose all one person, one vote challenges to plans with population deviations not rising to the 10% level, the Court would undoubtedly have said as much, rather than expressing that such plans are merely "prima facie"—in other words, rebuttably—constitutional. And in this case, because the population deviations in both the House Plan and the 2002 Senate Plan are 9.98%, the ten percent rule applies (albeit barely). In short, the legislative plans are presumptively constitutional, and the burden lies on the plaintiffs to rebut that presumption.

Id. at 1341. The court cited numerous district and circuit court opinions for the proposition that "plans with population deviations of less than 10% . . . are not automatically immune from constitutional attack." *Id.* at 1340 (collecting cases).

Applying this framework, the court found two reasons for the systematic population deviations in Georgia's plans. First, the court noted that these deviations favored rural and inner-city interests at the expense of suburban areas north, east, and west of Atlanta. *Id.* at 1327–29. Second, based on circumstantial evidence, the court found that there was "an intentional effort to allow incumbent Democrats to maintain or increase their delegation, primarily by systematically underpopulating the districts held by incumbent Democrats, by overpopulating those of

Republicans, and by deliberately pairing numerous Republican incumbents against one another." *Id.* at 1329–31.

The court recognized that traditional redistricting principles, when applied in a consistent and nondiscriminatory manner, may justify some level of population deviation. *Id.* at 1331; *see also Karcher v. Daggett*, 462 U.S. 725, 741 (1983) ("The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors."). Yet, in light of the regional favoritism and discriminatory incumbent protection, the court found no such justifications in the record. *Id.* at 1334.

With regard to incumbency protection, the court noted that it can be a "permissible cause of population deviations," but "*only* when it is limited to the avoidance of contests between incumbents and is applied in a consistent and nondiscriminatory manner." *Id.* (emphasis added). The court recognized Supreme Court precedent indicating that "an interest in avoiding contests between incumbents may justify deviations from exact population equality, not that general protection of incumbents may also justify deviations." *Id.* at 1348 (citing *Bush v. Vera*, 517 U.S. 952, 964 (1996); *Karcher*, 462 U.S. at 740; *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966)). A permissible

use of incumbency protection of this sort, however, was not supported by the record:

> In this case, it is clear that many of the incumbent-protecting population deviations were caused not by the legitimate state interest in avoiding contests between incumbents, but, rather by the more aggressive goal of allowing incumbents to avoid taking on more new constituents than was absolutely necessary to stay within 5% of the ideal district size. The defendant has not attempted to present any evidence that any of the population deviations were truly necessary to avoid pairing two incumbents. In short, in this case, the interest of incumbent protection was not applied in a reasonably consistent and nondiscriminatory way and cannot be used to justify the population deviations.

Id. at 1349.

With regard to the mapdrawers' awareness of population deviations and the potential ramifications of a deviation above 10%, the court noted that the mapdrawers "made no effort to make the districts as nearly of equal population as was practicable. In fact, it is quite apparent on this record that legislators and plan drafters made a concerted effort to contain population deviations to ± 5%, and no further, as they operated on the belief that there was a safe harbor of ± 5%." *Id.* at 1341. Addressing the perception of a 10% deviation safe harbor, the court stated that

> [s]uch use of a 10% population window as a safe harbor may well violate the fundamental one

> person, one vote command of *Reynolds*, requiring that states "make an honest and good faith effort to construct districts . . . as nearly of equal population as practicable" and deviate from this principle only where "divergences . . . are based on legitimate considerations incident to the effectuation of a rational state policy." The use of a 10% safe harbor may also conflict with the *Roman* Court's observation that "the constitutionally permissible bounds of discretion in deviating from apportionment according to population" cannot be stated in a uniform mathematical formula, as it assumes that 10% is such a mathematical formula.

Id. (internal citations omitted). Ultimately, however, the court did not answer this question "because the policies the [10% population window] was used to promote in this case were not 'free from any taint of arbitrariness or discrimination'" based on the lack of traditional redistricting principles, disfavoring of suburban areas in favor of rural and inner-city populations, and discriminatory and inconsistent protection of incumbents. *Id.* at 1341–42 (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)).

The court did not address whether "partisan advantage alone would have been enough to justify minor population deviations," though it did point out that "the Supreme Court has never sanctioned partisan advantage as a legitimate justification for population deviations." *Id.* at 1351.

(2) Supreme Court affirmance

A per curium Supreme Court summarily affirmed the district court's opinion. *Cox v. Larios*, 542 U.S. 947 (2004).

Justice Stevens wrote a concurrence, joined by Justice Breyer. *Id.* (Stevens, J., concurring). Stevens characterized the appeal as an "invit[ation] . . . to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever." *Id.* at 949. He was satisfied that the Court "properly reject[ed] that invitation" because one person, one vote remained the only clear limitation on partisan gerrymandering, and districting based solely on partisan interests was impermissible. *Id.* at 949–51.

Justice Scalia dissented, and would have set the case for argument because it was not clear "whether a districting plan that *satisfies* [the] 10% criterion may nevertheless be invalidated on the basis of circumstantial evidence of partisan political motivation." *Id.* at 951 (emphasis original). Scalia characterized the use of "politics as usual" as itself a traditional redistricting criterion, "so long as it does not go too far." *Id.* at 952. He stated that "[i]t is not obvious to me that a legislature goes too far when it stays within the 10% disparity in population our cases allow. To say that it does is to invite allegations of political motivation whenever there is a population disparity, and thus to destroy the 10% safe harbor our cases provide." *Id.*

iii. Harris v. Arizona Independent Redistricting Commission

Harris has been called "the Supreme Court's most recent, and arguably most lucid, pronouncement as to plaintiffs' burdens in one person, one vote cases below the 10% deviation threshold." *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 341 (4th Cir.

2016). There, a group of Arizona voters brought a one person, one vote challenge to a redistricting plan for the state legislature with a maximum population deviation of 8.8%. *Harris*, 136 S. Ct. at 1305–06, 1309. A three-judge panel entered judgment against the plaintiffs after a bench trial, finding that "the population deviations were primarily a result of good-faith efforts to comply with the Voting Rights Act . . . even though partisanship played some role." *Id.* at 1306.

On appeal, the Supreme Court unanimously affirmed. *Id.* Much of the Court's relatively brief opinion assessed the evidence presented at trial as it related to the plan's deviations and the reasons for them. *Id.* at 1307–09. The Court ultimately affirmed because the district court's conclusion that the deviations were justified by the legitimate factor of attempting to comply with the VRA was "well supported in the record." *Id.* at 1309. In particular, the Court pointed out that the population deviations resulted from a complex and thorough series of attempts at compliance with different requirements of the VRA, "even though partisanship played *some* role." *Id.* at 1308–09 (emphasis added). Beyond this factual conclusion, the Court clearly pronounced the applicable legal standard:

> In sum, in a case like this one, those attacking a state-approved plan must show that it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors rather than the "legitimate considerations" to which we have referred in *Reynolds* and later cases. Given the inherent difficulty of measuring and comparing factors that may legitimately account for small

> deviations from strict mathematical equality, we believe that attacks on deviations under 10% will succeed only rarely, in unusual cases.

Id. at 1307.

The voters specifically attempted to invoke *Larios*, arguing that it warranted a different result, but the Supreme Court disagreed:

> In [*Larios*], however, unlike the present case, the district court found that those attacking the plan had shown that it was more probable than not that the use of illegitimate factors significantly explained deviations from numerical equality among districts. The district court produced many examples showing that population deviation as well as the shape of many districts "did not result from any attempt to create districts that were compact or contiguous, or to keep counties whole, or to preserve the cores of prior districts." No legitimate purposes could explain them. It is appellants' inability to show that the present plan's deviations and boundary shapes result from the predominance of similarly illegitimate factors that makes [*Larios*] inapposite here. Even assuming, without deciding, that partisanship is an illegitimate redistricting factor, appellants have not carried their burden.

Id. at 1310 (internal citations omitted). While the *Harris* Court's treatment of *Larios* gives a good indication as to the applicable legal standard, it leaves open the question of whether and to what extent partisanship can justify a deviation of less than 10%. *Id.*

iv. Raleigh Wake Citizens Association v. Wake County Board of Elections

In *Raleigh Wake*, a group of voters in North Carolina brought one person, one vote challenges to two redistricting plans for local governmental units that had a total population deviation below 10%. *Raleigh Wake*, 827 F.3d at 338–39. After a bench trial, the district court found that the plans did not violate the one person, one vote principle. *Id.* at 340. The Fourth Circuit reversed, holding that the voters proved their one person, one vote claims. *Id.* at 338.

Raleigh Wake is not binding on this court, but it provides a thorough and insightful discussion of the applicable legal standard and the relationship between *Larios* and *Harris*. In *Raleigh Wake*, the Fourth Circuit applied the standard of review for state legislative plans as stated by the Court in *Harris*—"to succeed on the merits, plaintiffs in one person, one vote cases with population deviations below 10% must show by a preponderance of the evidence that improper considerations predominate in explaining the deviations." *Id.* at 342 (referencing *Larios* and *Harris*). The court contrasted the result of *Harris* with that of *Larios*, but explained these different results as the result of applying different facts to the same legal standard. *Id.* at 341. In *Harris*, the plaintiffs "foundered not because their one person, one vote challenge failed as a matter of law, but because they did not muster the evidence needed to show it to be 'more probable than not that [the] deviation of less than 10% reflect[ed] the predominance of illegitimate reapportionment factors.'" *Id.* (quoting *Harris*) (alteration in original). In *Larios*, on the other hand, "the plaintiffs succeeded in *proving* their one person, one vote

claims." *Id.* (emphasis added). In other words, *Larios* and *Harris* are two sides of the same coin, and a joint reading of these cases clarifies the legal standard to be applied.

v. summary of the burden of proof

The persuasive analysis of *Raleigh Wake*, along with *Harris* and its treatment of *Larios* provide a clear statement of the applicable burden—because Plan H283 contains a top-to-bottom deviation of less than 10%, Plaintiffs must show that it is more probable than not that the deviations reflect the predominance of illegitimate reapportionment factors rather than the "legitimate considerations" identified by *Reynolds* and later cases. *Harris*, 136 S. Ct. at 1307. Population deviations of less than 10% are not within a safe harbor and may still be challenged. *See Moore v. Itawamba Cty., Miss.*, 431 F.3d 257, 259 (5th Cir. 2005) ("[A] deviation less than ten percent is not a safe harbor, barring any claim of discrimination.").

3. Geographical nature of a *Larios* one person, one vote claim

i. applicable law

Although Plaintiffs originally asserted primarily statewide claims in their pleadings, as the case developed, they challenged population deviations in discrete geographic areas. They briefed these challenges to population deviations as both statewide claims and claims made in specific geographic areas. In their Post-Trial Brief, Defendants raise, but do not develop, a discussion-worthy point about the nature of a *Larios* one person, one vote claim by implying that such claims do not exist at a localized level, and can be made only against a plan as a whole. *See* Docket no. 1272 at 147 ("Even if *Larios* could

support a county-specific one-person-one-vote claim . . .''). This point raises a valid distinction between what was challenged in *Larios* and what is challenged here. In *Larios*, the plaintiffs challenged the plan *as a whole* by pointing out broad, statewide deficiencies and systematic deviations that disadvantaged suburban counties surrounding Atlanta. Here, the claims are geographically more dispersed and localized, with Plaintiffs pointing out deviations in specific areas across the state. Thus, the Court must address the conceptual question of whether a *Larios* claim can be made against specific districts in a plan that has a top-to-bottom deviation below 10%.

On this point, the court finds guidance in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265-68 (2015). There, two groups brought racial gerrymandering claims against an Alabama redistricting plan. *Id.* at 1263. Following a bench trial, a three-judge panel rejected these claims for several reasons. *Id.* at 1264. The court placed the challenges into two categories: (1) claims that the plans *as a whole* constituted racial gerrymanders, and (2) claims that the state racially gerrymandered four specific districts. *Id.* It then proceeded to dispose of these claims by "referr[ing] to the racial gerrymandering claims as claims that race improperly motivated the drawing of boundary lines of the State *considered as a whole*." *Id.* at 1265 (emphasis original).

The Supreme Court disagreed with this characterization of a racial gerrymandering claim as a statewide attack on a plan as a whole. Instead, the Court held, such a claim "applies to the boundaries of individual districts. It applies district-by-district. It does not apply to a state considered as an undifferentiated 'whole.'" *Id.*

The Supreme Court's reasoning for this conclusion was two-fold. First, it noted that it has "consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*." *Id.* (emphasis original). Second, and consistent with its first point, the Court recognized that the nature of the harm arising from a racial gerrymandering claim is individual and personal:

> [These harms] include being "personally . . . subjected to [a] racial classification," as well as being represented by a legislator who believes his "primary obligation is to represent only the members" of a particular racial group. They directly threaten a voter who lives in the district attacked. But they do not so keenly threaten a voter who lives elsewhere in the State.

Id. (internal citations omitted).

In light of its view of these claims as district-specific challenges, the Supreme Court criticized the panel's repeated characterization of the claims as attacks on the plan "as a whole." It noted that, as an evidentiary matter, statewide evidence may be used to "prove racial gerrymandering *in a particular district*," but this was different from a statewide challenge to the entire plan. *Id.* (emphasis added). Building off this, the Court next clarified that "voters might make the claim that *every* individual district in a State suffers from racial gerrymandering," but that this was not the same as "a claim of racial gerrymandering with respect to the State *as an undifferentiated whole*." *Id* at 1265-66 (emphasis original). Ultimately, the Supreme Court remanded for further findings with respect to the individually

challenged districts because "[a] showing that race-based criteria did not significantly affect the drawing of *some* Alabama districts . . . would have done little to defeat a claim that race-based criteria predominantly affected the drawing of *other* Alabama districts, such as Alabama's majority-minority districts primarily at issue here." *Id.* at 1266 (emphasis in original).

The obvious distinction between *Alabama LBC* and the present case is that *Alabama LBC* dealt with a racial gerrymandering claim. In light of the reasoning in *Alabama LBC*, this is a meaningful distinction—racial gerrymandering claims are consistently described and applied on a district-by-district level, as the Supreme Court's language in prior cases indicates.[69] Recognizing that the Court in *Alabama LBC* relied heavily on its prior linguistic formulations of racial gerrymandering claims in determining their geographic scope, this Court will conduct a similar analysis with respect to the language that describes one person, one vote challenges based on population deviations under 10%.

Early (pre-*Larios*) cases involving one person, one vote claims speak of challenges to "schemes" and to "plans," not to individual districts. *See, e.g., Reynolds*, 377

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[69] The Court quoted language from several seminal racial gerrymandering cases for this proposition. *E.g., Shaw v. Reno*, 509 U.S. 630, 649 (1993) (racial gerrymandering violation consists of "separat[ing] voters *into different districts* on the basis of race" (emphasis added)); *Bush v. Vera*, 517 U.S. 952, 965 (1996) (principal opinion) ("[Courts] must scrutinize *each challenged district* . . . " (emphasis added)); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) ("The plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without *a particular district*." (emphasis added)).

U.S. at 560, 586 ("[A]ttacks on *state legislative apportionment schemes*, such as that involved in the instant cases, are principally based on the Equal Protection Clause . . . Since, under neither the existing apportionment provisions nor either *of the proposed plans* was either of the houses of the Alabama Legislature apportioned on a population basis, the District Court correctly held that *all three of these schemes* were constitutionally invalid." (emphasis added)); *Gaffney*, 412 U.S. at 751-52 ("We must, therefore, respond to appellees' claims in this case that even if acceptable populationwise, *the Apportionment Board's plan* was invidiously discriminatory because a 'political fairness principle' was followed in making up the districts in both the House and Senate." (emphasis added)); *Regester*, 412 U.S. at 763-64 (reversing a three-judge district court judgment that "*the apportionment plan* for the State of Texas is unconstitutional as unjustifiably remote from the ideal of 'one man, one vote.'" (emphasis added)).[70]

Larios itself squarely fits this mold. *Larios*, 300 F. Supp. 2d at 1357 ("Judgment is entered in favor of the plaintiffs and against the defendant on Count I (Violation of Right to Equal Protection of the Laws), insofar as *the plaintiffs have alleged that Georgia's state legislative reapportionment plans* violate the one person, one vote principle." (emphasis added)). Even cases since *Larios*

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[70] *Regester* also upheld the district court's conclusion that multi-member districts in two specific counties were unconstitutional. *Regester*, 412 U.S. at 765-70. These determinations, however, were not made in the context of a one person, one vote challenge to population deviation, but rather through a different legal theory entirely. *See id.*

have allowed similar one person, one vote claims made on the basis of top-to-bottom deviation to proceed against a plan *as a whole*. *See Harris*, 136 S. Ct. at 1305 ("Appellants, a group of Arizona voters, challenge *a redistricting plan* for the State's legislature on the ground that *the plan's districts* are insufficiently equal in population . . . We consequently affirm a 3–judge Federal District Court decision upholding *the plan*." (emphasis added)).

On the other hand, one person, one vote claims against specific geographical areas have also been brought. In *Connor v. Finch*, one group of appellants challenged Mississippi's court-ordered Senate Plan "as a whole" but did not make a "blanket challenge to the entire House Plan," instead pointing only to several specific districts. *Finch*, 431 U.S. at 421 n.19. Nevertheless, the Court gave these appellants the benefit of the doubt, scrutinizing the entire House Plan even though only several specific districts were challenged:

> In the context of a court-ordered plan that results in the sort of systemic violation revealed by the figures in this record, *it is hardly appropriate to confine our scrutiny to particularly egregious, but localized examples of violations specifically relied on by the parties.* And even if the constitutional validity of the entire court-ordered House plan could not appropriately be viewed as an issue implicitly raised by the parties, this Court has the authority and the duty in exceptional circumstances to notice federal-court errors to which no exception has been taken, when they

> seriously affect the fairness, integrity or public reputation of judicial proceedings.

Id. (emphasis added) (internal citations omitted). Though the *Finch* Court was not entirely clear on its actions, it appears to have converted a claim against *specific geographic regions* within a plan into a claim *against the plan as a whole* due to the widespread impropriety of the deviations and public impact, even though the plaintiffs did not bring their claims as such.

This question of local-versus-statewide was even more acute in *Brown v. Thomson*, in which the Court ultimately refused to invalidate a Wyoming Plan with an 89% top-to-bottom deviation because only one specific geographic feature of the Plan was challenged. *Brown*, 462 U.S. at 846-48. The Court focused on one narrow issue, as framed by the district court in reliance on expert testimony—whether "the 'dilution' of the plaintiffs' votes is de minimis when Niobrara County has its own representative" despite being underpopulated by over 60%. *Id.* at 841. The Court answered this narrow question in the negative because the deviation in Niobrara County was entirely the result of consistently applied, nondiscriminatory state policies. *Id.* at 844-46.

Despite this holding, the 5-4 Court had to address the elephant in the room—the plan's overall deviation of 89%. The Court explained that the question was not before it because the plaintiffs did not challenge the entirety of the Wyoming Plan:

> [W]e are not required to decide whether Wyoming's nondiscriminatory adherence to county boundaries justifies the population deviations that exist throughout Wyoming's representative

> districts. Appellants deliberately have limited their challenge to the alleged dilution of their voting power resulting from the one representative given to Niobrara County. The issue therefore is not whether a 16% average deviation and an 89% maximum deviation, considering the state apportionment plan as a whole, are constitutionally permissible. Rather, the issue is whether Wyoming's policy of preserving county boundaries justifies the additional deviations from population equality resulting from the provision of representation to Niobrara County.

Id. at 846 (footnotes omitted).

Justice O'Connor joined the majority, but wrote a separate concurrence, expressing "the gravest doubts" about the constitutionality of the statewide legislative plan, but agreeing that the relevant geographic focus was Niobrara County rather than the plan as a whole, based on the plaintiffs' characterization of their claims. *Id.* at 849-50 (O'Connor, J., concurring) (joined by Stevens, J.).

Justice Brennan, joined by three others, dissented. *Id.* at 850-61 (Brennan, J., dissenting). The dissenting justices would have reached the question of the entire plan's constitutionality under the one person, one vote principle in light of its 89% deviation. *Id.* at 853-56 (Brennan, J., dissenting). Though the dissent does not squarely explain why it would do so even though the plaintiffs did not bring this claim, it points out the unlikelihood that "any future plaintiffs challenging a state reapportionment scheme as unconstitutional will be so unwise as to limit their challenge to the scheme's single most objectionable feature . . . [A]t least plaintiffs henceforth will know better than to exercise moderation

or restraint in mounting constitutional attacks on state apportionment statutes, lest they forfeit their small claim by omitting to assert a big one." *Id.* at 851 (Brennan, J., dissenting). From the dissent's point of view, the practical import of the *Brown* holding is limited because plaintiffs in future cases will bring appropriately broad claims.

The split between the majority and dissent in *Brown* explains the geographic scope of a one person, one vote claim—it is whatever the plaintiff makes it. These challenges can be plan-wide, location-specific, or both. Were it otherwise, there would be no cause for disagreement among the justices in *Brown* because this disagreement is over whether the plaintiff had in fact brought a statewide challenge or a limited, localized challenge. The majority found that the plaintiff only challenged one specific county and its district, while the dissent nevertheless felt that the plan as a whole was subject to scrutiny in that case. In either event, implicit in this disagreement is that both a state-wide challenge and a localized challenge are legally cognizable theories under the one person, one vote principle, and that it is up to the plaintiff to choose his challenge. Though it appears that the method of choice for plaintiffs in these cases is to challenge a plan as a whole, *e.g.*, *Larios*, 300 F. Supp. 2d 1320, this trend of strategic choices is simply consistent with Justice Brennan's prediction that plaintiffs in such cases would bring both narrow and broad claims.

The second portion of the Court's reasoning in *Alabama LBC* was that racial gerrymandering claims were properly characterized as district-by-district claims because the "harms" that arise from these violations are "personal" in that a voter in a racially gerrymandered district is personally subjected to a racial classification, is

personally represented by a legislator who believes he is only there to represent members of a racial group, and is personally affected so long as he lives in the challenged district. This aspect of the Court's reasoning is both similar to and distinct from a one person, one vote challenge.

By their very nature, a plan with population deviations will overvalue voters in underpopulated districts and undervalue voters in overpopulated districts. The voter in the overpopulated district will be personally affected by overpopulation because his vote will matter less, whereas another voter in another part of the state will not necessarily suffer this same harm unless his district is also overpopulated. Thus, like a voter in a racially gerrymandered district, a voter in an overpopulated district suffers a harm that is personal to him and is not necessarily experienced by a voter in another part of the state. This explains why a one person, one vote challenge, like a racial gerrymandering claim, can be brought on a district-by-district basis.

On the other hand, the harms that result from population deviation can be broader. In cases like *Larios* and *Harris*, the fact that the top-to-bottom deviation *in a plan as a whole* is less than 10% determines the burden of proof for analyzing compliance with the one person, one vote principle. A different burden ("a prima facie case of discrimination") applies in cases with a statewide deviation of greater than 10% *in a plan as a whole*. *Brown*, 462 U.S. at 842-43 (citing *Swann v. Adams*, 385 U.S. 440, 444 (1967) (discussing plan-wide deviations of 30% and 40%)). Because the law treats *plans* differently based on the amount of overall plan-wide deviation, these

challenges can be and frequently are made to a plan as a whole.

In sum, if a plaintiff characterizes his one person, one vote claim as a challenge to an entire plan with an overall deviation of less than 10%, the geographic nature of that claim is plan-wide. *See, e.g., Harris*, 136 S. Ct. at 1305; *Larios*, 300 F. Supp. 2d at 1357. On the other hand, if a plaintiff characterizes his one person, one vote claim as a challenge to a specific piece within an entire plan with an overall deviation of less than 10%, the geographic nature of that claim is limited to that specific piece of the plan. *See, e.g., Brown*, 462 U.S. at 846. Both are valid legal theories for challenging a plan, and both claims can be made together.

ii. Plaintiffs' claims

Because the geographical nature of Plaintiffs' claims depends on how they have presented these claims, the Court must assess the pleadings and briefing to determine precisely what is being challenged. This is no easy task.

LULAC and the Perez Plaintiffs assert challenges of this sort, even though Defendants urge that the Perez Plaintiffs have not brought such a claim. *See* Docket no. 1272 at 3 n.5, 49 n.23. The Perez Plaintiffs' complaint is not a model of clarity,[71] but it, along with their other

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[71] LULAC joined the Perez Plaintiffs in their live complaint, which states "Plaintiff LULAC joins this complaint for the limited purpose of challenging the redistricting of the Texas House of Representatives as set forth in paragraph 32 below." Docket no. 960 at 2 (Perez Plaintiffs' and LULAC's Sixth Amended Complaint). This complaint, however, ends at paragraph 28, in which Plaintiffs assert what the court views as a *Larios*-type challenge to the Texas House plan. *See id.* Notably, however, the Perez Plaintiffs' previous

briefing and the issues presented at trial, sufficiently states that they are making these challenges.

Precisely *what* these Plaintiffs are alleging, however, is a moving target. Overlooking the apparent error in the Perez Plaintiffs' and LULAC's Joint Sixth Amended Complaint, the Court will look to this live pleading and assume that these parties meant to join in the same claims set forth therein. Under this reading, the Perez Plaintiffs and LULAC potentially challenge the following districts in Plan H283 as violating one person, one vote principles: 102, 105, 107, 113 (Dallas County); 132, 135 (Harris County); 26 (Fort Bend County); 93, 96 (Tarrant County); 54 (Bell County); and 56 (McLennan County). Docket no. 960 ¶¶ 12, 28. The Complaint seeks a declaration that "the existing plans for election of the Texas House of Representatives . . . [are] in violation of . . .the 14th Amendment," which indicates that the Perez plaintiffs and LULAC also challenge Plan H283 as a whole. *Id.* at 6. However, because they also bring intentional vote dilution claims under the Fourteenth Amendment, it is difficult to discern whether all of these areas involve alleged one person, one vote violations.

The complaint is only a starting point. The Perez Plaintiffs have identified other geographic areas throughout their briefing, though they do not always point to specific districts. In addition to the above-listed districts, the Perez Plaintiffs point out additional districts

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complaint, which is not joined by LULAC, lists its *Larios*-type claims in paragraph 32. Docket no. 898 at 8 (Perez plaintiffs' Fifth Amended Complaint). It appears that the Perez Plaintiffs made an error in explaining which claims LULAC joins, and intended to state in their Sixth Amended Complaint that LULAC joins the *Larios* claims in paragraph 28.

when discussing potential issues with population deviation. For example, in their Post-Trial Brief, they add districts 137, 144, and 149 in Harris County. Docket no. 1303 at 1. In addition, the Perez Plaintiffs bring up certain counties in their briefs but it is unclear whether they rely upon the Fourteenth Amendment for the intentional vote dilution or one person, one vote claims, or both. *E.g.*, Docket no. 1303 at 5 (discussing McLennan County). In their briefing, it is also unclear whether they are challenging specific geographic areas (whether certain districts, certain counties, or certain unnamed districts in certain named counties), whether they are pointing to these problem areas as evidence of a plan-wide claim, or both.

For guidance, the Court looks to the Perez Plaintiffs' Proposed Conclusions of Law. Docket no. 1265. There, the second conclusion of law lists the following districts as violating the Fourteenth Amendment, though again it is unclear whether this is intended to be limited to their intentional vote dilution claims: HDs 101, 102, 103, 104, 105 (Dallas County); HDs 132, 137, 145, 148, 149 (Harris County); HD93 (Tarrant County); HD117 (Bexar County); HD41 (Hidalgo County); "McLennan County District 57 in the Benchmark Plan" (which is associated with HD56); HD 54 (Bell County); and HD26 (Fort Bend County). *Id.* In addition, the third proposed conclusion of law states, "HB 283 has unconstitutionally excessive population deviation among the House districts in Dallas, Harris and Tarrant Counties. These deviations are the result of gerrymandering along racial ethnic and partisan lines, in violation of the principles established in *Cox v. Larios*, 542 US 947 (2004). Accordingly, the redistricting plans for these counties are void." *Id.*

Between the districts identified in the Sixth Amended Complaint and these proposed findings of fact and conclusions of law, the Court construes this to be the scope of the Perez Plaintiffs' claims. At their broadest, the Perez Plaintiffs challenge Plan H283, as a whole, along with the entire counties of Dallas, Harris, and Tarrant. Construing the claims as such reconciles the main differences between the identified districts in the Complaint and conclusions of law, which are mostly in Dallas and Harris Counties. Finally, they challenge the identified districts in Hidalgo, Bell, and Fort Bend Counties, as well as all districts in Dallas, Harris, and Tarrant Counties individually.

Importantly, and more generally, the Perez Plaintiffs *and LULAC* allege *Larios* violations "[p]rimarily in the multi-member urban counties," but make clear that they are not alleging violations "mainly in the ex-urban and rural areas of the state" where "there may be a plausible explanation for the population deviations" in the County Line Rule. Docket no. 738 at 21-22. They state that "the entire House plan does not have to be redrawn." *Id.* The Court construes these more generalized claims as an adoption by LULAC of the claims that the Perez Plaintiffs have brought to specific districts and counties in the "multi-member urban counties" throughout the state. This would encompass the aforementioned counties and districts, along with Nueces County.

MALC asserts similar claims. *See* Docket no. 734 at 8–13. Broadly, MALC's claim is that Latino-majority districts within whole counties were overpopulated. *Id.* Aside from the generalized claim, MALC's briefing identifies several particularly problematic areas in Harris County (HDs 145, 147, 149) and Hidalgo County (HDs 30,

31, 36, 39, 41). *Id.* It appears that MALC also asserts a claim against Plan H283 as a whole. Docket no. 1275 at 45–47 (MALC's Proposed Conclusions of Law). *Id.*

D. Standing

Before the Court turns to the merits of the Plaintiffs' claims, it must consider whether they have standing on the *Larios*-type one person, one vote claims that they assert. The elements of standing are well-established:

> the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (internal citations omitted) (most alterations original). "An association has standing to bring suit on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 181 (2000).

The geographic nature of the parties' claims makes a complex, party-by-party standing inquiry unnecessary because as discussed above, LULAC asserts the broadest claims with respect to individual districts, and LULAC has members in each of the challenged districts identified above.[72] In order to establish its standing, LULAC recently filed a motion for leave to supplement the record with a declaration from its Texas State Director, Elia Mendoza. Docket no. 1342. In the declaration, Mendoza states that "there are multiple members of LULAC who are eligible voters in each of the . . . State Legislative Districts" in Dallas County, Tarrant County, Harris County, Bell County (including specifically the city of Killeen), the "Lower Rio Grande Valley Counties" (which would encompass Hidalgo County), and Fort Bend

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[72] Again, we find guidance from *Alabama LBC*. Aside from addressing the geographic nature of the claims brought, the Supreme Court reviewed the district court panel's opinion on standing. *Alabama LBC*, 135 S. Ct at 1268. The district court *sua sponte* dismissed claims brought by the Alabama Democratic Conference—one of the two plaintiffs—because it found that the Conference did not prove that it had members in the challenged districts. *Id.* at 1268–70. The Supreme Court remanded, stating that "elementary principles of procedural fairness required that the District Court, rather than acting *sua sponte* [and dismissing], give the conference an opportunity to provide evidence of member residence" by providing a membership list. *Id.* What necessitated the standing analysis in the first place, however, was that the Conference brought a broader list of claims than the other plaintiff, the Alabama Legislative Black Caucus, which had adequately proven its standing but brought a narrower list of claims. *Id.* at 1264. Here, LULAC is both the party with the broadest standing and the party bringing the broadest array of claims. Therefore, unlike in *Alabama LBC*, the standing inquiry is less important, and the Court rests its analysis of the merits on the standing of LULAC, which covers all of the *Lavios* claims in the lawsuit.

County, among others. Docket no. 1342-1 at 3. In addition, LULAC identifies specific members by name in HD149 (Harris County), HD54 (a challenged Bell County district), HD34 (a challenged Nueces County district), and HD36 (a challenged Hidalgo County district). *Id.*

Defendants oppose LULAC's request for leave to supplement the record with Mendoza's declaration. Docket no. 1343. They argue that LULAC does not justify its failure to introduce this evidence sooner, and that supplementing the record now is prejudicial because they never had an opportunity to challenge the declaration. *Id.* at 3-4, 6-7. In addition, Defendants point to a stipulation that they made with LULAC to end a previous discovery dispute between the parties. *Id.* at 4 (citing docket nos. 955, 956, 975, 1000). This dispute arose from LULAC's alleged failure to supplement its initial disclosures and respond to certain interrogatories and requests for production. *See* docket no. 955 at 2. The Court granted Defendants' initial motion to compel. Docket nos. 955, 956. After LULAC allegedly failed to comply with that order, Defendants filed two motions for sanctions. Docket nos. 975, 1000.[73] By their motion for sanctions, Defendants sought to prevent LULAC from introducing evidence and witnesses at trial relating to the merits of its claims. *See* docket no. 1000 at 3-5. Ultimately, the parties resolved this dispute through a stipulation, which stated:

> *In connection with Defendants* [sic] *Second Motion for Sanctions Against the LULAC Plaintiffs*, [Defendants] and [the LULAC

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[73] Defendants withdrew the initial motion for sanctions, docket nos. 975, 977, and later filed the second motion, which is similar to the first and seeks the same relief as the first, docket no. 1000.

> Plaintiffs], hereby agree as follows: 1. LULAC's only witness at the 2014 trial will be their disclosed expert George Korbel. LULAC agrees that it shall not call any other witnesses at the 2014 trial. 2. At trial, LULAC will only offer exhibits that were: a. previously offered by LULAC in the 2011 Section 2 trial of this matter; or b. provided to Defendants on May 24, 2014, and at the deposition of George Korbel scheduled for May 27, 2014.

Docket no. 1002 (emphasis added).

LULAC's motion for leave to supplement the record is granted. As an initial matter, the Court points out that the prior discovery dispute centered around information unrelated to LULAC's standing or the residency of its members, and the resulting stipulation between Defendants and LULAC was made "[i]n connection with" that dispute. As Defendants' motion for sanctions made clear, Defendants were only seeking LULAC's contentions and proposed testimony related to the merits of its case. *See* docket no. 1000 at 3-5.[74] The language of

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[74] Without rehashing the entirety of the relief that Defendants sought by their motion for sanctions, the Court recounts two illustrative examples:

> The State Defendants request an order prohibiting the LULAC plaintiffs from presenting evidence, testimony or otherwise supporting their claims on the following issues, is appropriate at this time: [sic] 1. LULAC's contention that the Texas Legislature engaged in intentional discrimination against minorities in passing the 2011 Congressional Plan (C185) and the 2011 Texas House of Representatives Plan (Plan H283). (RFP 2). . . . 17. Testimony by unknown individuals involved in preparing plans of apportionment, and testimony about such plans. (2011 Disclosures at ¶ 5).

Docket no. 1000 at 3, 5.

the discovery requests at issue and a letter from Defendants' attorneys to LULAC's attorney likewise show that this discovery dispute was never about evidence, facts, or information relating to LULAC's standing. *See generally* docket nos. 975-5, 975-6, 975-7, 975-8, 975-9. Thus, because LULAC's stipulation was made "in connection with" a discovery dispute surrounding the merits of LULAC's contentions, that stipulation does not extend to the present request for leave, which is limited to only evidence on LULAC's standing.

Beyond this, "[i]n deciding whether to reopen evidence, a court should weigh the importance and probative value of the evidence, the reason for the moving party's failure to introduce the evidence earlier, and the possibility of prejudice to the non-moving party." *Aransas Project v. Shaw*, 775 F.3d 641, 655 (5th Cir. 2014) (internal quotations omitted). Courts are permitted "wide discretion" in exercising their powers over the presentation of evidence, which includes the reopening of evidence. *In re Perry*, 345 F.3d 303, 309–10 (5th Cir. 2003). LULAC considers its failure to present the declaration sooner as a simple technicality, docket no. 1342 at 2, while Defendants complain that they will be severely prejudiced by being unable to challenge the declaration, docket no. 1343 at 6-7. Neither party addresses the importance and probative value of the declaration, but both are extremely high and weigh heavily in favor of granting leave. Without the declaration, LULAC's standing will be entirely unclear, and such a deficiency will have come to light only long after the end of trial and after the Court has expended vast resources in analyzing the parties' contentions on the merits. Similarly, the probative value

of LULAC's declaration is high, as the Supreme Court has recognized in similar circumstances that there is "no reason to believe that [an association plaintiff in redistricting litigation] would have been unable to provide a list of members . . . had it been asked." *Alabama LBC*, 135 S. Ct at 1269–70.[75] Further supporting Plaintiffs' request for leave is *Alabama LBC*, which guides courts to recognize "elementary principles of procedural fairness" and consider allowing presentation of a membership list before dismissing redistricting claims for a lack of standing. *Id.*

Consistency also dictates this result. In its previous order addressing the Plaintiffs' challenges to the congressional maps, the Court addressed a similar request from the Task Force for leave to file under seal a list of its members. Docket no. 1339 at 100-01 (granting docket no. 1314). The Task Force and Defendants presented similar arguments concerning the excuse for the failure to present standing evidence sooner and the prejudice to Defendants in granting the motion. Ultimately, the Court granted the Task Force's motion:

> The Court initially found that the Task Force had satisfied the pleading standard for associational standing, and neither the Court nor Defendants again raised the issue. Given the undisputed existence of standing with regard to CD6 and the strong likelihood that an individual member of the

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[75] To be clear, this is not to say, as LULAC requests, that the Court takes judicial notice of LULAC's membership list. Instead, the Court simply recognizes that the organization's declaration of the residences of its own members is highly probative of where those members reside.

> Task Force's member organizations would have standing to challenge CD26, the Task Force was not dilatory in seeking to admit evidence, especially given that the *Shaw* claims have not been a primary focus of the litigation, the issue had not been pressed by Defendants or the Court, and the Task Force had First Amendment and privacy concerns about releasing member information. Defendants are not surprised by this claim and were not so concerned about the issue to have raised it again via motion for summary judgment or otherwise. *See Mullaney v. Anderson*, 342 U.S. 415, 417 (1952) (allowing joinder of parties on appeal to address lack of standing and noting that "[t]o . . . require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration").

Docket no. 1339. This logic holds true here. The *Larios* claims at issue in this standing analysis have not been the primary focus of the litigation up to this point. Prejudice to Defendants is mitigated by the fact that they were on notice of the declaration (which LULAC originally filed in April 2015 as an exhibit to its briefing on *Alabama LBC*, docket no. 1302-1), and did not seek summary judgment or otherwise press the standing issue. Accordingly, LULAC's motion for leave is granted.

Having granted LULAC's motion for leave to supplement the record with Mendoza's declaration that sets forth the residences of LULAC's members, the Court finds that LULAC has standing to bring *Larios* one person, one vote claims because it has individual members in each of the challenged areas. Because no other plaintiff asserts a *Larios* claim in an area where LULAC does not,

whether other plaintiffs have standing is irrelevant, and the Court must analyze the merits of these claims regardless. *See supra* footnote 71 and accompanying text.

E. Analysis of the merits of the population deviation claims

"[T]he proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. 695, 710 (1964). The *Roman* Court's pronouncement that minor deviations (below 10%) can only be justified by "certain factors that are free from any taint of arbitrariness or discrimination" is often quoted, and provides a high-level guide for what types of factors plaintiffs may use as evidence to invalidate a plan with a deviation below 10%. *See, e.g.*, *Larios*, 300 F. Supp. 2d at 1340; *Gaffney*, 412 U.S. at 777 n.4; *Finch*, 431 U.S. at 415; *Brown*, 462 U.S. at 843; *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1090 (D. Ariz. 2014), *aff'd*, 136 S. Ct. 1301 (2016).

The Supreme Court has identified several specific traditional redistricting criteria that, when applied in a nondiscriminatory manner, will justify deviations. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). This list includes "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Id.* A *Larios*-type one person, one vote challenge

necessarily focuses on the reasons behind the population deviations because of the applicable burden of proof—the plaintiffs must show that it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors rather than the "legitimate considerations" identified by *Reynolds* and later cases. *See Harris*, 136 S. Ct. at 1307.

In general, the parties contest the legitimacy of the reasons behind the deviations, to the extent that there are reasons given. Looking to these reasons, Defendants have not consistently argued that making districts compact and preserving the cores of prior districts created the deviations, even though these are permissible reasons for population deviations under *Karcher*. In addition, Defendants point to further reasons that are not identified in *Karcher* but that nonetheless warrant full discussion. The court now turns to these reasons.

1. Mistaken belief in a 10% safe harbor

The mapdrawers' most common explanation for the deviations is that they believed that under *Larios*, a map with a deviation under 10% could not be challenged. Tr994 (Downton); Tr1473-74 (Interiano). Mapdrawers believed that they would not have to proffer any further explanation. *Id.* Because of this belief, population deviations were intentionally not minimized beyond 10%, and were not explained or justified on the legislative record during the session. Tr1494 (Interiano): Downton 8-12-11 depo. (Joint Ex. J-62) at 14-15.

Mapdrawers were aware of the one person, one vote principle and of *Larios v. Cox*. Interiano 8-26-11 depo. (Joint Ex. J-61) at 11-12. Hanna stated at a March 2011 HRC hearing that a 10% deviation is allowed "without

justification." D-590 at 40. He cautioned, however, that *Larios* might mean that "the old ten percent rule, which was a safe harbor, may not be any more." *Id.* Hanna went further: "[i]f all [of a] certain kind of district are drawing small, then we start to run into the sort of issues that they [had] in [*Larios v.*] *Cox*. Or if all the districts are drawing big, we start to run into that question. That's not fully developed jurisprudence yet but that starts to get me a little bit concerned." *Id.* at 45. Hanna advised that, to avoid *Larios* problems, the Legislature should "[e]nsure that all deviations are justified by a legitimate, consistently applied policy such as the preservation of county lines" and should "[m]ake sure that deviations in a plan with a total deviation of less than 10 percent do not consistently advantage or disadvantage one or more regions, racial or ethnic groups, or political parties." Perez-132 at 1. At the April 15 HRC meeting, Rep. Madden and Luis Figueroa of MALDEF also discussed *Larios*, and Rep. Madden noted that the case "indicated that you had to pay attention to deviations from the standard so that you didn't have one group as under and other groups as over." D-595 at 57.

The TLC's publication, *State and Federal Law Governing Redistricting in Texas* included similar admonitions:

> [I]t is reasonably clear that, so long as the total deviation range of a state legislative plan remains under 10 percent, the state is not required to strive for a more exacting level of population equality. Within this range, the state is relatively free to use population deviation for any rational purpose. However, as discussed . . . , a discriminatory scheme of population deviation may be invalid for

> other reasons, even if the range of deviation is less than 10 percent. . . . Even if a legislative plan has an overall range of population deviation less than 10 percent, a pattern of population deviation within that range to further invidious intentional discrimination or that inadvertently results in the systematic underrepresentation of a racial or ethnic group may be held invalid on other grounds. . . . To minimize the chance of a successful challenge under the somewhat amorphous *Larios* standard, mapmakers may want to consider, in a legislative redistricting plan with an overall deviation of less than 10 percent, avoiding deviations that consistently advantage or disadvantage a particular political, racial, or ethnic group or region of the state.

US-357 at 36-37, 39.

In spite of these warnings, mapdrawers assumed they could have a 10% deviation *without justification*, and drew the map on that assumption. Yet this assumption is not only wrong in light of the governing law, but also in light of the record—mapdrawers were repeatedly warned that under *Larios*, plans with deviations below 10% were *not* immune from challenge.

More importantly, this mistake, even if it explains the existence of the deviations, is not a justification for the deviations. It may be true in part that mapdrawers did not pay attention to deviations (so long as they were under 10%) because they mistakenly believed that they had a

10% safe harbor.[76] But the free-wheeling use of deviations up to 10% without furthering any other constitutionally acceptable redistricting criteria is not itself a constitutionally acceptable redistricting criterion. In *Reynolds*, the Supreme Court stated that "[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible." *Reynolds*, 377 U.S. at 579.

This pronouncement set up a simple framework—deviations may exist, but they must be justified by the right reasons. Cases beyond *Reynolds* have added the 10% threshold to this framework as the leeway for mapdrawers to further *other* legitimate criteria; the threshold itself is not a legitimate criterion. To hold otherwise would overlook the Supreme Court's language in *Roman* describing which criteria may justify minor deviations below 10%: "[F]actors that are free from any taint of *arbitrariness* or discrimination." *Roman*, 377 U.S. at 710 (emphasis added).

Still, though the mistaken belief in a 10% safe harbor does not justify a deviation, the burden of proof is on Plaintiffs to show that it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors rather than the "legitimate considerations" identified by *Reynolds* and later cases. *Harris*, 136 S. Ct. at 1307. Defendants argue that Plaintiffs have not carried this burden because the

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[76] As discussed, this factual assertion is not credible—mapdrawers were repeatedly warned that the Plan might be scrutinized even if its overall deviation was below 10%.

mapdrawers' mistaken belief was accompanied by the occasional use of other traditional redistricting criteria and was not accompanied by the use of any illegitimate factors. On this point, Defendants argue that *Larios* should yield to *Rodriguez* v. *Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004). There, the court found "that an express objective of staying within a ten-percent deviation *while pursuing other legitimate goals* provides no support to the plaintiffs' claim of invidious or arbitrary discrimination or of bad faith." *Id.* at 367 (emphasis added). The court ultimately granted summary judgment against the plaintiffs' one person, one vote challenge to a New York state plan with an overall deviation of 9.78%. *Id.* at 365, 370-71.

Pataki and *Larios* are not inconsistent, though they are factually distinct. On the impermissible and inconsistent use of incumbency protection, the *Pataki* court noted that the New York plan, unlike the Georgia plan in *Larios*, "reflect[ed] a legitimate effort to avoid incumbent pairs." *Id.* at 367-68 n.23. As for favoritism of some geographic areas of a state at the expense of others, the New York plan "appl[ied] the accepted principle of maintaining the core of districts" in both the allegedly favored and disfavored districts. *Id.* at 370 n.27.

Importantly, the *Pataki* court identified "many permissible redistricting considerations" that influenced the mapdrawers: "[The State Legislative Task Force on Demographic Research and Reapportionment] was interested in contiguity, compactness, preserving the cores of existing districts, desiring not to pit incumbents against one another, respecting then-current political subdivisions and county lines, and staying within the ten-percent-deviation parameter of *Brown*." *Id.* at 367-68. In

Larios, on the other hand, no similar considerations were at work. *Larios*, 300 F. Supp. 2d at 1331. Though Georgia argued that its use of incumbency protection could justify the deviation, the court found that the use of incumbency protection was inconsistent and discriminatory. *Id.* The state did not attempt to identify any other "state polic[y] that, when applied in a consistent and nondiscriminatory manner [could] justify some population deviation." *Id.* (citing *Karcher* 462 U.S. 725 (1983)).[77]

Pataki is similar to the present case in one main way—in both cases, mapdrawers knew that the legal implications of their plans would change when overall population deviation exceeded 10%. This similarity alone, however, is not in any way outcome determinative, just as this fact alone was not dispositive in *Pataki*. Though the *Pataki* court recognized that "[n]o invidious purpose can be inferred from such conduct *alone*," the court there found that New York's mapdrawers were mindful of the 10% threshold "*while pursuing other legitimate goals.*" *Pataki*, 308 F. Supp. 2d at 367 (emphasis added). As explained in the court's contrast to *Larios*, the New York mapdrawers' awareness of the threshold was accompanied by several other traditional, neutrally applied redistricting criteria that were present in the record.

Therefore, this Court must assess the other purported justifications for the population deviations to determine whether Plaintiffs have carried their burden. Specifically,

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[77] "The other policies [that could justify the deviations] were not causes of the population deviations in the House Plan and 2002 Senate Plan; nor indeed, were they priorities at all in drafting the plans. In fact, the defendant has never claimed that they were." *Larios*, 300 F. Supp. 2d at 1331.

the Court will search for "factors that are free from any taint of arbitrariness or discrimination" that may have caused the deviations. *Roman*, 377 U.S. at 710.

2. Adherence to the County Line Rule

Mapdrawers adhered to the County Line Rule, as they interpreted it, and Defendants argue that this caused the deviations in Plan H283. Under this Rule,

> whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties.

TEX. CONST. art. III, § 26. A rule of this sort was identified by the *Karcher* Court as a "legislative polic[y] [that] might justify some variance," so long as it is evenly applied. *See Karcher*, 462 U.S. at 740 ("Any number of consistently applied legislative policies might justify some variance, including, for instance . . . respecting municipal boundaries."). Therefore, the Court will analyze whether the County Line Rule was in fact a cause of the deviations in Plan H283 to determine whether it justifies them.

It is clear that use of the County Line Rule would necessarily result in a top-to-bottom deviation of close to 10%, which explains why the County Line Rule is a

legislative policy that can justify deviations from the statewide ideal. Using whole counties necessarily limits mapdrawers' ability to control the population within districts, and adherence to the County Line Rule would cause some top-to-bottom deviation in Plan H283, even if used in consistent and neutral ways on a countyby-county basis. For example, HD61 in Parker and Wise Counties (which is not challenged) is the most overpopulated district in Plan H283 with a deviation of 5.02% (8,417 persons), but adherence to the County Line Rule explains this deviation—the Rule necessitates the joinder of these two whole counties and the addition of their population. However, the most underpopulated district, HD90, is one of several districts within Tarrant County, and thus the County Line Rule did not dictate its exact size. Therefore, the County Line Rule does not explain the entire top-to-bottom deviation of Plan H283.

Moreover, application of the County Line Rule would not justify deviations among districts *within multi-district counties* (also referred to as "drop-in counties"). Such districts could have equal population based on a county ideal size or could all have roughly equal deviations from statewide ideal. Interiano calculated deviation only statewide, without looking at individual counties except to fit them in to the statewide deviation. Interiano 8-26-11 depo. (Joint Ex. J-61) at 10-11. Similarly, Solomons was not aware of any legal justification for intra-county deviations, but assumed the staff would know why there were deviations. Tr1596-98 (Solomons). Accordingly, many deviations (discussed below), which occur *within* counties, are not the result of the County Line Rule.

Dr. Alford made a broad-based attempt to justify the county-level deviations in light of the County Line Rule.

TrJ1872. He reached this general conclusion in two ways. First, he analyzed adjusted average population deviation by taking into account drop-in counties and examining their deviation from their county ideals. TrJ1872-73. To do this, he calculated a new ideal for all districts outside of drop-in counties, which he said would take out the possibility that data for these districts are being obscured by drop-in county districts. *Id.* He found that minority-majority CVAP districts are underpopulated by 172 persons and majority-Anglo districts are overpopulated by 91 persons. TrJ1873-74; D-168 at 24. Using SSVR, he found that SSVR-majority districts are overpopulated by 80 persons while districts below 50% SSVR are underpopulated by 21. TrJ1874; D-168 at 24.

Second, Alford analyzed deviations in all drop-in counties as a collective whole by using adjusted countywide ideals. TrJ1875. He found on average that minority-majority-CVAP districts are underpopulated by 149 persons and Anglo-CVAP-majority districts are overpopulated by 141 persons. TrJ1876; D-168 at 25. He further found that the average SSVR-majority district was 626 persons underpopulated and the average <50% SSVR district was 209 persons overpopulated. *Id.*

Crucially, however, Alford did not analyze any individual drop-in county, nor did he look for discriminatory patterns in particular areas.[78] TrJ1900. This deficiency in Alford's analyses makes his results consistent with Arrington's general view of Plan H283—when viewed in light of the County Line Rule, Plan H283

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[78] The Court finds this particularly important because different mapdrawers were involved in drawing the different challenged areas.

may not exemplify a statewide, systematic pattern of overpopulation of minority districts, but there may nonetheless be individual geographic areas within the Plan where the one person, one vote principle was violated. TrJ1880 (Alford); TrJ1821 (Arrington).

Kousser went further, testifying that deviations and different treatment of urban Democrat districts—particularly Latino ones—simply cannot be explained by partisanship or the County Line Rule. Tr235-37. Martin's testimony also indicates the County Line Rule cannot explain many of the county-level deviations in Plan H283. According to Martin, there are 14 counties with two or more whole districts contained within them. Tr379. Of the 150 districts in the Plan, these 14 counties account for 93 of the districts. Tr380. Martin testified that each of these 93 districts could have been drawn to zero deviation, but that instead, eight of the 14 counties (accounting for 75 districts) have a deviation over 3.5% from the county ideal. Tr380-81. Implicit in this analysis is that each of these 93 districts could have been drawn without any deviation and without violating the County Line Rule because these districts are wholly contained within a county. According to Martin, there was never any other justification given for the deviations in Plan H283. Tr381.

Aside from the broad expert testimony that reveals flaws in Defendants' reliance on the County Line Rule to justify deviations, a close-up look at its applications in several individual areas (as discussed below) shows that it usually is not the cause of the challenged deviations and therefore cannot justify them.

3. Avoiding contests between incumbents and protecting incumbents

In *Karcher*, the Supreme Court specifically identified "avoiding contests between incumbent Representatives" as a "legislative polic[y] [that] might justify some variance," so long as it was consistently applied and nondiscriminatory. *Karcher*, 462 U.S. at 740; *see also LULAC v. Perry*, 548 U.S. 399, 412 (2006) (recognizing that avoiding the pairing of incumbents has been recognized as a neutral redistricting standard). This purported justification was at the heart of *Larios*; other than this factor, none of the other policies identified in *Karcher* were at issue. *Larios*, 300 F. Supp. 2d at 1331.

Looking to the numbers, the *Larios* court pointed out that in the House plan, "forty-seven incumbents were paired, including thirty-seven Republicans, which was 50% of the Republican caucus, but only nine Democrats, comprising less than 9% of that caucus (as well as one Independent [who was considered a Republican])." *Id.* at 1329. Six of the 21 districts involved in the pairing of incumbents were multi-member districts, meaning that 28 of the paired incumbents could be reelected while the other 19 would be unseated. *Id.* In the Senate plan, there were six incumbent pairings—four were Republican–Republican and two were Republican–Democrat. *Id.* The result of these pairings was the lost seats of 18 House Republican incumbents (compared to three Democrats) and four Senate Republican incumbents (compared to zero Democrats). *Id.* at 1329-30.

In addition to the raw numbers, the *Larios* court looked to the shapes of the districts, noting that they were drawn to force Republicans to run against one another,

along with the process for obtaining such a design: "[I]ndividual Democratic incumbents negotiat[ed] with the plans' drafters to draw them the safest possible districts." *Id.* at 1330. Not only did Democratic incumbents take these measures to secure their own seats, but they also "targeted particular Republicans to prevent their re-election." *Id.* In conclusion, the court tied these incumbency pairing measures together with the population deviations, noting that

> Republican-leaning districts are vastly more overpopulated as a whole than Democratic-leaning districts. Indeed, by one measure, the House Plan contains fifty overpopulated and thirteen underpopulated Republican-leaning districts, compared to only twenty-two overpopulated and fifty-nine underpopulated Democratic-leaning districts, and the 2002 Senate Plan contains nineteen overpopulated and seven underpopulated Republican-leaning districts, compared to only eight overpopulated and twenty-two underpopulated Democratic-leaning districts. Moreover, as we have noted, the large positive deviations often occurred in districts that paired Republican incumbents.

Id. at 1331 (internal citations omitted).

In part, this feature of *Larios* has been left open; as the court there stated, "[w]e need not resolve the issue of whether or when partisan advantage alone may justify deviations in population, because here the redistricting plans are plainly unlawful . . . [P]artisan interests are bound up inextricably with the interests of regionalism and incumbent protection. It is simply not possible to

draw out and isolate the political goals in these plans from the plainly unlawful objective of regional protection or from the inconsistently applied objective of incumbent protection." *Id.* at 1352. In *Harris*, the Court refused to answer a similar question of the permissible use of politics. 136 S. Ct. at 1310.

With this guidance in mind, an extensive analysis of incumbency pairing and protection is not necessary here, nor is an ultimate answer on the question of what role "politics as usual" may have played. The role of incumbency pairing in this case is much smaller than in *Larios*, where it was hotly contested and played a large role in the statewide outcome. Here, Plan H283 paired fourteen incumbents, only two of whom were Democrats. This is a far cry from the systematic level of pairing mostly Republican incumbents in *Larios*.

Solomons set the standard early in the process that only members of the same party would be paired, and this rule was consistently followed. Tr1427 (Interiano). The fact that only two Democrats were paired is due to the operation of the County Line Rule and redistricting leadership's views concerning whether districts were protected by the VRA. There is no indication that population deviations were used to target Democrat incumbents. However, Defendants also have not offered any evidence showing that any particular population deviations challenged by Plaintiffs were the result of avoiding incumbent pairings. In short, because neither side has presented evidence that mapdrawers created deviations to avoid the pairing of incumbents, this factor has little evidentiary value.

4. Compliance with the VRA

Aside from broadly stating the applicable burden of proof in challenges to plans where population deviation is below 10%, *Harris* provides an analysis of whether and how attempts to comply with the VRA can justify deviations. There, a three-judge district court panel found that the Arizona plan's 8.8% deviation was "primarily a result of good-faith efforts to comply with the Voting Rights Act . . . even though partisanship played some role." *Harris*, 136 S. Ct. at 1306 (quoting the district court panel opinion, 993 F. Supp. 2d 1042, 1046 (D. Ariz. 2014)). The Supreme Court affirmed, with the conclusion that the record showed that Arizona's mapdrawers made a good-faith attempt at compliance with the VRA, which is a "legitimate state consideration that can justify some deviation from perfect equality of population."[79] *Id.*

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[79] In finding that attempted VRA compliance was a "legitimate consideration" that might justify population deviations, the Court stated:

> In cases decided before *Shelby County v. Holder*, 570 U.S. –, 133 S. Ct. 2612 (2013), Members of the Court expressed the view that compliance with § 5 of the Voting Rights Act is also a legitimate state consideration that can justify some deviation from perfect equality of population. *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring in judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, JJ.); *id.*, at 475, n. 12, (Stevens, J., concurring in part and dissenting in part, joined in relevant part by Breyer, J.); *id.*, at 485 n. 2 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.); *see also Vieth v. Jubelirer*, 541 U.S. 267, 284 (2004) (plurality opinion) (listing examples of traditional redistricting criteria, including "compliance with requirements of the [Voting

When creating the Arizona plan, an independent five-member redistricting commission created by the Arizona Constitution started with a grid-patterned map with a total deviation of 4.07%. *Id.* at 1308. After reviewing the grid and consulting with several legal and mapdrawing experts, all five Commissioners agreed that the plan would need to by precleared by the Justice Department under the VRA, and that the former benchmark plan contained 10 ability-to-elect districts. *Id.* After conducting an "iterative process" in which the Commissioners strengthened minority voting strength by adjusting the initial grid's boundaries, they published a new plan with 10 ability-to-elect districts for public comment. *Id.*

Around the same time, however, the Department of Justice indicated that it might not view the new plan as containing 10 ability-to-elect districts, but per normal DOJ protocol, it did not specify precisely how it would calculate ability-to-elect districts. *Id.* The calculations behind this determination were complex and in part unpredictable. *Id.* "The upshot [of the DOJ's process and calculations] was not random decision-making but the process did create an inevitable degree of uncertainty." *Id.*

This uncertainty, the Court said, "could lead a redistricting commission, as it led Arizona's, to make serious efforts to make certain that the districts it believed were ability-to-elect districts did in fact meet the criteria that the Department might reasonably apply." *Id.* The Commission reconsidered the boundaries of its plan,

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Rights Act]"). It was proper for the Commission to proceed on that basis here.

Harris, 136 S. Ct. at 1306-07 (citations altered).

and decided to strengthen its ability-to-elect districts by making several changes. *Id.* Several of these changes were uncontroversial and were unanimously approved by the Commission. *Id.* at 1308-09. Others were not—a change to one of the boundaries was characterized as "'hyperpacking' Republicans into other districts" by a Republican member of the Commission. *Id.* at 1309. A Democrat proponent of the change replied that it could create an eleventh ability to elect district, and the change was ultimately approved. *Id.* When Arizona submitted this plan to the DOJ for preclearance, it cited these changes in support of its argument, even though the DOJ ultimately concluded that the changed district was not an ability-to-elect one. *Id.*

The Supreme Court found that the district court's conclusion that deviations were caused by good-faith attempts at compliance with the VRA was well supported in the record. *Id.* In sum, "'the record b[ore] out' that the deviations 'predominantly reflected . . . efforts to achieve compliance with the federal Voting Rights Act, not to secure political advantage for one party.' In other words, the plaintiffs in *Harris* foundered not because their one person, one vote challenge failed as a matter of law, but because they did not muster the evidence needed to show it to be 'more probable than not that [the] deviation of less than 10% reflect[ed] the predominance of illegitimate reapportionment factors.'" *Raleigh Wake*, 827 F.3d at 341 (citations omitted).

5. Use of illegitimate redistricting factors

Because the burden of proof on these claims still rests on Plaintiffs to affirmatively show that it is more probable than not that a deviation of less than 10% reflects the

predominance of illegitimate reapportionment factors rather than legitimate considerations, the Court must assess the use of illegitimate factors as well as the legitimate ones discussed above. *See Harris*, 136 S. Ct. at 1307. In short, Plaintiffs argue that the State intentionally discriminated against minority voters by overpopulating minority districts and underpopulating Anglo districts. Such a practice is, of course, an illegitimate redistricting factor. *See Gaffney*, 412 U.S. at 751.

6. Analysis

i. Nueces County

Nueces County is a drop-in county with two districts, HD32 and HD34. Under 2010 census figures, it was apportioned 2.0295 districts based on the statewide ideal. Because the County had more than enough population for two districts, mapdrawers could have faithfully applied the County Line Rule *and* drawn two districts wholly contained in Nueces County, each with roughly equal population that was only slightly above the statewide ideal. In fact, mapdrawers did so in the initial versions of the House plan, including in the first public version Plan H113.

In Plan H113, HD32 and HD34 were roughly equally overpopulated—HD32 (Hunter's district) was 1.61% overpopulated and HD34 (the Latino opportunity district) was 1.34% overpopulated. Yet further changes were made that resulted in HD32 being underpopulated by 563 persons (a deviation of -0.34% from the statewide ideal) and HD34 being overpopulated by 5,512 (a deviation of 3.29% from the statewide ideal), nearly ten times the size

of the underpopulation in HD32.[80] As the numbers reflect, HD34 is significantly more Hispanic in population and significantly more overpopulated than HD32, which is significantly more Anglo and is underpopulated, despite the fact that there is enough population in Nueces County for *both* districts to be overpopulated.[81] Based on this evidence of the use of race in drawing the lines in Nueces County to overpopulate the minority district while underpopulating the Anglo district, the Court finds that Plaintiffs have proven *Larios* claims here.

ii. Hidalgo County/HD41

The County Line Rule also does not explain the population deviations in the Hidalgo County districts. Hidalgo County was not a drop-in county because it had surplus population. In Plan H283, four districts are wholly contained within Hidalgo County—HDs 36, 39, 40, and 41. Three of these four districts are overpopulated—HD36

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[80] Between Plan H113 and H153, HD34 went from 1.34% overpopulated to 2.89% overpopulated; from Plan H153 to Plan H283, overpopulation in HD34 rose further still to 8.29%.

[81] The only potential explanation given by Defendants concerning population disparities in Nueces County is that mapdrawers sought to draw HD34 as a district that would perform reliably for Latino voters. However, that justification is demonstrably *not* the reason for the population disparity between HD32 and HD34 in Plan H283. When mapdrawers initially drew the two Nueces County districts with roughly equal population, David Hanna assessed HD34 as "clearly performing" in his retrogression memos, and Solomons later touted HD34 in Plan H113 as being a "performing" Latino district in Nueces County. D-327; D-206. Thus, the further changes that led to the population disparities cannot be explained by needing to make HD34 a "performing" Latino opportunity district. Thus, neither the County Line Rule nor compliance with the VRA explain the population deviations in Nueces County.

has a 2.61% deviation (4,368 persons), HD39 has a 4.62% deviation (7,746 persons), and HD40 has a 3.49% deviation (5,856 persons). The fourth, HD41, is underpopulated by 4.41% (-7,399 persons), even though Hidalgo County is overpopulated to the point where it must shed excess population into HD31, which includes Starr and Zapata Counties to the west.

A comparison of the racial makeup of the underpopulated HD41 to the three overpopulated districts in Hidalgo County reveals that HD41 is significantly less Hispanic than the other three districts. The overpopulated districts all have an HCVAP above 80% (HD36 is 88.7%, HD39 is 82.4%, and HD40 is 89%), while the underpopulated HD41 is 72.1% HCVAP. The difference is starker in terms of total SSVR—HD36 is 85.1%, HD39 is 82.2%, and HD40 is 85.8%, while HD41 is 63%.[82] As in Nueces County, the County Line Rule does not explain deviations *within* Hidalgo County, and Defendants have not even suggested that these deviations were necessary to comply with the Rule. Rather, these deviations disadvantage the more Hispanic districts to the benefit of the less Hispanic HD41. And the record shows that the true reason for this deviation was to ensure that Republican incumbent Rep. Peña had a favorable district (one that had more Anglo population and less Hispanic population).

Incumbency protection (not necessarily avoiding the pairing of incumbents) was a large factor in Hidalgo County (particularly in HD41). As discussed above,

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[82] HD31, the district with which Hidalgo County shares its surplus population, is overpopulated by .6% (999 persons) and is 90.8% SSVR.

Hidalgo County contains four whole districts, three of which are overpopulated and one of which is underpopulated (HD41). Interiano drew the initial configuration of what became HD41 in the final Plan H283 with the express goal of giving Peña the best chance to get re-elected. Although Downton made some changes to address the fact that HD41 was underpopulated, the findings of fact detail the use and purposes of these changes—particularly, the many precinct splits, some of which use race as a proxy for partisanship—and based on this evidence we reach the unmistakable conclusion that the underpopulation of HD41 was intentional, politically motivated, and explained by race.

Mapdrawers' express and admitted political goal of protecting the incumbent Peña in HD41 went too far in its use of race and partisanship. Thus, though political motivation of protecting the Republican incumbent Peña was the proffered justification for the deviations in Hidalgo County, the means of accomplishing this goal (the illegitimate use of race to split Latinos off into the overpopulated districts of Hidalgo County while hoarding Anglos into the underpopulated HD41 and intentionally leaving it underpopulated compared to its neighboring districts to avoid adding in more Hispanics) was not a legitimate, neutrally applied redistricting policy. The underpopulation of HD41 and overpopulation of the surrounding districts was intentional, with the stated goal of maximizing Republican performance and the unstated goal of limiting Hispanic population in HD41 to get Peña reelected. Tr1478 (Interiano).

Implicit in this discussion so far is that the underpopulation of HD41 is the cause of the relative overpopulation of Hidalgo County's other districts. Of

course, adherence to the County Line Rule in a county that as a whole is overpopulated (such as Hidalgo County) will necessitate some overpopulation of all districts within the county, though it will not explain underpopulation of any of them (like HD41). But the uneven application of political protection, especially when furthered by race-based precinct splits that fit the larger allegation of burying Latino voters into overpopulated districts, is not a legitimate reapportionment policy that can justify the county-level deviations between HD41 and its surrounding districts. Accordingly, the purported use of incumbency protection in HD41 cannot justify the overpopulation of the surrounding districts in Hidalgo County.

Defendants argue that population deviations in Hidalgo County are justified when viewed in terms of different population metrics. They point out that the VAP of the districts in Hidalgo County is as follows: 104,939 (HD31), 111,643 (HD36), 114,761 (HD39), 112,156 (HD40), and 111,689 (HD41, Peña's district). Docket no. 457 at 41–42. They further point out that the CVAP of these districts is as follows: 56,380 (HD31), 67,940 (HD36), 74,275 (HD39), 69,900 (HD40), and 79,770 (HD41, Peña's district). *Id.* at 42. Based on these figures, HD41 has the highest CVAP of all districts in Hidalgo County, and ranks in the middle in terms of VAP. Thus, Defendants argue, whatever disparity exists among the total population in the five Hidalgo County House districts, it does not diminish the voting strength of voters outside HD41. *Id.* at 42.

This argument is nothing more than an after-the-fact attempt to justify population deviations that were illegitimately drawn into Hidalgo County in the first

place. Nothing in the record indicates that mapdrawers relied on VAP or CVAP to achieve population equality in Plan H283. Rather, it is undisputed that they measured their compliance with one person, one vote requirements by *total population*, and they cannot now use VAP or CVAP numbers to make post-hoc arguments that no violation occurred. The argument further misses the point because it does not explain how or why the population deviations exist. An emphasis on high VAP and CVAP in HD41 is not an explanation for the deviation but rather stems from the same common cause of the deviations—the admitted goal of intentionally underpopulating HD41 to create a less-Hispanic, Republican district that would ensure Peña's reelection. A person with knowledge of the area would know how to do this by splitting precincts, and the precinct splits in HD41 reflect precisely this goal with the added side effect of increasing VAP and CVAP. Therefore, despite Defendants' attempt to minimize the harm from deviations in HD41, the population deviations in Hidalgo County are not the result of any legitimate redistricting considerations, and instead were driven only by the partisan objective of reelecting Peña, which was achieved in part through the use of race. Absent the use of any other legitimate redistricting principles, these population deviations, like those in *Larios*, result from the "inconsistently applied objective of incumbent protection."

iii. Dallas County

The 8.88% top-to-bottom deviation within Dallas County cannot be explained by the County Line Rule. Dallas County's population decreased compared to the rest of the state, which resulted in Dallas County having

enough population for 14.1266 districts, such that all districts in Dallas County theoretically could have been overpopulated. That was not the case in Plan H283.

Both Latino districts in Dallas County are overpopulated—HD103 deviates from the statewide ideal by 5% (8,379 persons) and HD104 deviates by 3.07% (5,147 persons). One of the four African-American districts is overpopulated—HD109 deviates from the statewide ideal by 3.9% (6,539 persons)—while the other three are underpopulated—HD100 is -3.87% (-6,494 persons), HD 110 is -0.05% (-90 persons), and HD111 is -0.39% (-658 persons). Therefore, three of the six minority districts in Dallas County are overpopulated, and three are underpopulated. This same ratio of overpopulated-to-underpopulated districts was true for Anglo districts in Dallas County, as four are overpopulated and four are underpopulated. But the underpopulation of Anglo districts in Dallas County was more severe,[83] while the overpopulation was not as severe.[84] Based on these numbers alone, minority voters in Dallas County fared worse than Anglo voters. This is especially true when looking specifically at Latino districts—HD103 was overpopulated by 5% and HD104 was overpopulated by 3.07%.

The potentially problematic deviations in Dallas County are confined to the interplay between the two Latino districts (HDs 103 and 104) and the Anglo district

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[83] The average deviation in an underpopulated minority district in Dallas County is -1.44%, while the average deviation of an underpopulated Anglo district in Dallas County is -1.85%.

[84] The average deviation in an overpopulated minority district in Dallas County is 3.99%, while the average deviation of an overpopulated Anglo district in Dallas County is 3.10%.

to their west, HD105. The two Latino districts are overpopulated by an average of 4.04% from statewide ideal (HD103 by 5.00% and HD104 by 3.07%). HD105 is also severely overpopulated at 4.83%. As the following will make clear, the composition and overpopulation in these western Dallas County districts is mostly caused by shifts of population among the three districts. Thus, it appears that the rest of Dallas County is not problematic, and simply does not match the Plaintiffs' broad theory that minorities were systematically disadvantaged by being crowded into overpopulated districts.[85]

Kousser opined that HD103 and HD104 (the two overpopulated Latino districts) were overpopulated to "pack" as much Latino population as possible into those districts, making it much more difficult to draw additional opportunity districts for the minority population growth, which accounts for 100% of Dallas County's 350,000 population growth (in fact, Anglo population decreased by 198,000 in Dallas County). Anchia, HD103's representative, was himself displeased with the overpopulation of his district, and felt that there was an effort to put a lot of unnecessary population into the district. Arrington made a similar observation, noting that Hispanic districts are overpopulated, which makes it more

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[85] The numbers bear out this conclusion. Not counting the two Latino districts that are subject to closer scrutiny, the average minority district in Dallas County was actually *under*populated at -.10% deviation from statewide ideal while the average Anglo district (not counting HD105) was overpopulated by .03%. Thus, because overpopulation in the Anglo districts is more severe than in the minority districts, Plaintiffs have not shown that Dallas County as a whole uses population deviations to systematically disadvantage minority voters.

difficult to create another minority district. TrJ222. Martin's analysis was more technical, pointing out that the 8,091-person excess in HD105 (4.83% overpopulation) is Anglo population drawn from the south, which makes the district less likely to elect Latino candidates of choice. TrJ330-32. The only explanations given for this strange configuration of west Dallas County are that mapdrawers needed to pair Rep. Anderson with Rep. Harper-Brown and needed to maintain SSVR in HD103 and HD104. TrJ2018 (Downton).

The map of these western districts in Dallas County supports the experts' conclusions, as described in the discussion of Plaintiffs' vote dilution claims above. The boundary of HD105 divides the cities of Grand Prairie and Irving, and splits 22 precincts along with numerous communities of interest. Tr321-23 (Martin); US-387 at 7; US-299. It represents a drastic change from the benchmark, extending much further out with jagged, bizarrely shaped lines. TrJ1107-08 (McPhail). The portion of HD105 that reaches into Grand Prairie picks up "the most Anglo part of the city," follows the "least Hispanic channel that could have been drawn," and leaves seven split Latino precincts in HD104. Tr321-22 (Martin). These precinct splits placed a disproportionately affluent Anglo population in HD105 and a disproportionately low-income Hispanic population in HD104. *E.g.*, TrJ151 (Arrington); TrJ599-609 (Lopez). HD103 contains a long, narrow arm of mostly Latino population that extends through HD105 in Irving and splits 10 precincts, removing all of this Hispanic population from HD105. Tr323 (Martin).

Downton deliberately split precincts by using race to put Hispanic voters in HDs 103 and 104 while keeping them out of HD105. TrJ2020-24 (Downton). Increasing

the Anglo population of HD105 prevents it from providing minority opportunity. The Perez Plaintiffs presented demonstration Plan H288, with a total deviation of 1.72% and which maintained HD105 with a combined B+HCVAP of 45.8% using 2005-2009 ACS data and 50.1% using 2008-2012 ACS data, while otherwise containing the same number of BCVAP-majority (3) and HCVAP-majority (1) districts as Plan H283 using 2008-2012 ACS data. Joint Ex. J-33; D-110.

Although Downton indicated in his deposition that it would be hard to maintain the SSVR of HD103 at closer to ideal population, he agreed at trial that it was *not* necessary to have a 5% deviation in HD103 to maintain the Hispanic population, and that there were others ways to have done it, "but that was a policy decision." TrJ2149. Maps such as Plan H288 show that the SSVR of HD103 could be maintained or even increased without such overpopulation. Joint Map. Ex. J-33 (HD103 is 38.7/40.6% SSVR while only 1.31% overpopulated).

Further, between Plan H113 and Plan H283, the total population was increased, but the non-suspense SSVR (available to mappers in RedAppl) was not. The overpopulation increased from 4.59% to 5%, while non-suspense SSVR remained at 38.1% (total SSVR went up .1%). D-112 at 10, 30. Downton had also testified that HD103 was overpopulated because he worked with Rep. Anchia to include that population, but Rep. Anchia was not happy that his district was overpopulated and felt that extra population had been included unnecessarily. Tr999; TrJ2017. Thus, none of Downton's explanations for the overpopulation of HD103 are credible.

These facts are compelling. As indicated in the discussion on Plaintiffs' § 2 claims, the mapdrawers

intentionally diluted minority voting strength in western Dallas County in part by manipulating total population. But Plaintiffs overlook that the net result of this manipulation does not manifest itself in racially inequitable deviations among the three districts that were trading population for one person, one vote purposes—the Anglo HD105 deviates from the statewide ideal by 4.83%, which is more than the average deviation in HD103 and HD104. While the lines were drawn to push Latino population into the Latino districts, they were also drawn to push Anglo population into HD105. This practice in itself, as discussed above, may be illegal in other ways. But in terms of overpopulation, Anglos in HD105 fared just as poorly as did the Latinos of HDs 103 and 104. In short, the overpopulation in western Dallas County may be an intentional vote dilution tactic, but when it is viewed in light of the relationship between the districts that caused this overpopulation, the deviations themselves are not the basis for a one person, one vote claim.[86]

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[86] The Court notes a tension between the standard for a § 2 intentional vote dilution claim and a *Larios* claim, which helps explain why Plaintiffs succeed on the former but fail on the latter in western Dallas County. To succeed on a § 2 intentional vote dilution claim, Plaintiffs have the burden of showing that discriminatory purpose is a "motivating factor"; they need not show that race was the sole decisionmaking factor or motivation. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977); *Veasey v. Abbott*, 830 F.3d 216, 230 (5th Cir. 2016). To succeed on a *Larios* claim, Plaintiffs have the burden of showing that illegitimate reapportionment factors "predominated" in bringing about the challenged population deviations. *Harris*, 136 S. Ct. at 1307. Of course, one such illegitimate reapportionment factor would be the improper use of race. Thus, a plaintiff challenging population deviations through a *Larios*-type one person, one vote claim would have to show the *predominance* of illegitimate reapportionment

Accordingly, Plaintiffs have not shown that Dallas County's population deviations reflect the predominance of illegitimate redistricting factors.

iv. Harris County

As in Dallas County and several others, the Court first dispels the assertion that the County Line Rule explains deviations in Harris County. Overall deviation among districts within Harris County is 9.74%, but a map could have been drawn with only 1.81% deviation (this would have been easy, according to Martin). Tr356-58. Because the Legislature chose to go with 24 districts, there was enough population to draw all districts at or above the statewide ideal. Despite the ability to overpopulate all districts, some districts were underpopulated and some were overpopulated.[87]

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factors (including race), while a plaintiff bringing a § 2 intentional vote dilution claim would only have to show that a racially discriminatory purpose is a "motivating factor" because the VRA is concerned with racial motives and not others. Section 2 of the VRA is not concerned with whether a district is over- or under-populated *per se*, but whether its configuration was produced at least in part by a racially discriminatory/dilutive motive. In contrast, the harm in a one person, one vote context is being in an overpopulated district. In short, a *Larios* plaintiff can rely on evidence of a broader array of redistricting practices to reach the higher predominance standard; a § 2 intentional vote dilution plaintiff has to present evidence limited to racially discriminatory purpose, but need only satisfy the lower "motivating factor" standard.

[87] This analysis of the County Line Rule does, however, belie MALC's assertion that "[t]here is no explanation as to why three out of 4 majority Latino districts in Harris County are overpopulated." Docket no. 1185 at 9. Because Harris County was drawn down to 24 districts, there was sufficient population in the County to overpopulate *all* districts.

Of the 24 districts in Harris County, 13 are Anglo majority and 11 are majority minority.[88] Of the 13 Anglo districts, 10 were overpopulated while three were underpopulated. Of the 11 minority districts, eight were overpopulated while three were underpopulated. Thus, the percentage of Anglo districts that were overpopulated (10/13, or approximately 77%) was actually greater than the percentage for minority districts (8/11, or approximately 73%).

The average Anglo district is overpopulated by 1.51%, while the average minority district is overpopulated by 1.97% compared to the statewide ideal. Based on the county ideal,[89] the deviations appear smaller, though the difference between average deviation of an Anglo district (-.21%) and that of a minority district (.25%) is roughly the same. These numbers take into account the three underpopulated Anglo and three underpopulated minority districts. Looking only at these underpopulated districts, underpopulated minority districts (-2.86% from statewide ideal) are actually *more* underpopulated than their Anglo counterparts (-2.09% from statewide ideal).

The raw data in Harris County points in conflicting directions. The likelihood that an Anglo district will be overpopulated is higher than the likelihood that a minority district will be overpopulated. An average minority district, however, will have more overpopulation than an average Anglo district. Both statistical measures

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[88] HD148 and HD137 were both non-majority HCVAP, but were performing for Latinos and minorities. For purposes of this analysis, they are counted among the 11 minority districts.

[89] The total population of Harris County's districts (4,092,459) divided by the number of districts in the County (24) yields the county ideal—170,519.

of the overpopulation in Harris County are close—the difference between the occurrence of overpopulation in a district of each type is only about 4%, and the difference in overpopulation between an average district of each type is only about .46%.

Considering these numbers, Plaintiffs have not shown that it is more probable than not that the deviations reflect the predominance of illegitimate reapportionment factors rather than legitimate considerations. The difference in overpopulation between the average minority district (1.97%) and the average Anglo district (1.51%) is slight. A difference so slight may be the result of many incidental or legitimate reapportionment criteria. The Plaintiffs have simply not provided evidence to affirmatively state which illegitimate factors were used in drawing the Harris County lines, and how deviations so small among the Anglo and minority districts resulted from these factors predominating in the mapdrawing process. At most, Plaintiffs have provided circumstantial evidence in the form of a pattern of overpopulation in minority districts in Harris County. But that evidence is particularly weak given the small difference in overpopulation between Anglo and minority districts and the higher percentage of overpopulated Anglo districts. Accordingly, Plaintiffs have failed to carry their burden.

v. Tarrant County

Application of the County Line Rule cannot explain the deviations within Tarrant County. Tarrant County contains the smallest district in the entire plan—HD90, with a deviation from the statewide ideal of -4.90% (8,209 persons). Despite this fact, the Court does not find that the population deviations within Tarrant County support

Plaintiffs' one person, one vote claim. The Court has found that redistricters increased the SSVR in HD90 in bad faith, but doing so required them to *underpopulate* HD90. Further, the minority districts in Tarrant County are all underpopulated (HD90 is -4.90%, HD95 is -3.58%, and HD101 is -1.77%), and HD90 and HD95 are the most underpopulated in the County, while two Anglo districts (HD97 and HD99) are overpopulated. The one person, one vote challenge in Tarrant County fails.

vi. Fort Bend County

Unlike in many of the other counties, where the County Line Rule does not explain the existence of deviations within a county, Fort Bend County's relatively small deviations can be explained by the mapdrawers' need to work within the confines of the County Line Rule. Suburban Fort Bend County experienced significant growth, so mapdrawers turned the County from two wholly contained districts with some surplus into three wholly contained districts with some surplus. This spillover was joined with Wharton and Jackson Counties in HD85.

The districts in Fort Bend County deviate very little from one another—HD26 deviates from the statewide ideal by -4.50% (7,546 persons), HD27 deviates by -4.51% (7,553 persons), and HD28 deviates by -4.33% (7,264 persons). Within the confines of the County Line Rule, the underpopulation of these districts was apparently caused by a legitimate need to increase the size of the spillover to combine it with two other counties to form a new district. In addition, HD27, the minority district, is the *most* underpopulated. These districts do not manifest problematic population deviations. Plaintiffs have not

shown that it is more probable than not that the population deviations in Fort Bend County (and specifically, the challenged HD26) reflect the predominance of illegitimate reapportionment factors rather than legitimate considerations. The one person, one vote challenge to Fort Bend County fails.

vii. Bell and Lampasas Counties

The Court next looks to Plaintiffs' challenges to Bell and Lampasas Counties and their two districts, HDs 54 and 55. In the prior plan, HD54 combined all of Burnet County, all of Lampasas County, and a small extension in the western side of Bell County. The extension into Bell County contained almost all of the city of Killeen, which previously contained only a minor split (separating only 200 residents from the city). HD55 was composed of the remainder of Bell County.

In Plan H283, Burnet County is removed from HD54 and no longer combines with any part of Lampasas or Bell Counties. The departure of Burnet County's population left HDs 54 and 55 without sufficient population to fill two full districts, and both could have been underpopulated compared to the statewide ideal. Yet HD54 (Aycock's district), which combines all of Lampasas County with the western section of Bell County, is overpopulated compared to the statewide ideal by 0.06%, while HD55 (the remainder of Bell County) is underpopulated at -3.26%. A comparison of the prior and current maps reveals that it would have been relatively easy to draw HD54's extension into Bell County in a way that left both HDs 54 and 55 equally underpopulated, but this was not done.

The changes in Plan H283 that created the existing deviations are problematic in terms of the vote dilution that they cause (which has been previously discussed) and the population deviations that they create (which are discussed below). With Burnet County removed, HD54 lost 42,000 voters, and went from 29,000 overpopulated to 13,000 underpopulated. TrJ1402 (Korbel). Mapdrawers then removed *more* population from HD54. To do this, they enlarged what was previously a minuscule, 200-resident split in the city of Killeen. The new split removed a larger, mostly minority segment of Killeen's population—32,000 persons, about two-thirds of whom were minorities—from HD54 and placed it into HD55. TrJ1404 (Korbel). At the same time, Plan H283 made a change in the other direction by removing 47,000 mostly Anglo persons from southwest Bell County (formerly in HD55) and placing them in HD54. TrJ1405 (Korbel). The net result was a 15,000 population shift from HD55 to HD54, with HD54 becoming more Anglo by gaining residents from southwest Bell County and less minority by splitting Killeen. In terms of population deviation, these changes left HD54 at 0.06% overpopulation and HD55 at -3.26% underpopulation, even though both could have easily been underpopulated.

The Court has already recounted both the goal of these changes and the means for achieving this goal. In short, the goal was to draw two Republican districts, but the means for accomplishing this goal was splitting minority population in Killeen and making Aycock's district more Anglo. And, as previously detailed, this constituted evidence of intentional vote dilution under § 2 of the VRA and the Fourteenth Amendment.

Aside from the intentional vote dilution caused by the population shifts among HDs 54 and 55, these same shifts also caused population deviations in contravention of the one person, one vote principle. Because both districts could have been underpopulated compared to the statewide ideal, the one person, one vote principle, when combined with the County Line Rule, counsels that any deviations between the districts should be justified by legitimate redistricting criteria. Here, however, the motives for changes that caused the deviations were exceedingly political and racial.

In order to ensure that both districts remained Republican, mapdrawers traded 47,000 mostly Anglo voters in HD55 for 32,000 mostly minority voters in HD54 by splitting Killeen. In doing so, mapdrawers intentionally used race in a way that would overwhelm the remaining Latino voters of HD54 with the new influx of Anglo voters while also stranding a large portion of Killeen's minority voters in the already heavily Anglo HD55. As a result, mapdrawers exacerbated the existing population deviations, which could have easily been remedied. In light of the overtly political goals, the use of race, and the absence of any other justification for the population deviations, the Court finds that deviations here resulted from the predominance of the illegitimate use of race to ensure that both districts remained Republican.

viii. Statewide Claims

In sum, the Plaintiffs have shown by a preponderance of the evidence that population deviations in the following areas reflect the predominance of illegitimate reapportionment factors: Nueces County, Hidalgo

County, and Bell/Lampasas Counties. Plaintiffs *have not* shown the same in the following areas: Dallas County, Harris County, Tarrant County, Fort Bend County, and everywhere else in the state.

The relative failure of Plaintiffs' localized *Larios* claims obviates the need for a particularly detailed analysis of their statewide challenge to Plan H283 as an undifferentiated whole. Areas in which Plaintiffs' *Larios*-type, one person, one vote claims succeeded directly implicate only nine districts out of the 150 in Plan H283. As described in detail above, though Defendants have not affirmatively explained many deviations in the remaining areas of the state, Plaintiffs have likewise failed to do so in those areas.

Broadly, the evidence shows that deviations exist, and that mapdrawers worked under the mistaken belief that these deviations could exist without justification. Plaintiffs point to a conglomerated view of population deviations across the state and encourage the Court to draw the inference that these deviations must have been caused by mapdrawers' desire to harm minority voters. Otherwise, the Plaintiffs point to little specific evidence in the record in support of their claims. Though the Court recognizes that such circumstantial evidence may be used to prove a violation of the one person, one vote principle, as was done in *Larios*, the evidence here simply is not strong enough to show the statewide predominance of illegitimate factors in creating the population deviations in Plan H283, except for in the few isolated areas described above. Plaintiffs' statewide *Larios* challenge to Plan H283 fails.

V.

The Court turns briefly to address a fundamental flaw in Judge Smith's dissent. His analysis conflates the standards for *Shaw*-type racial gerrymandering claims and intentional vote dilution claims into one test—"race for its own sake"—derived from the Supreme Court's recent decision in *Bethune-Hill*. However, in first recognizing the *Shaw*-type racial gerrymandering claim, the Supreme Court cast it as "analytically distinct" from a vote dilution claim. *Shaw v. Reno*, 509 U.S. 630, 652 (1993). This view was reaffirmed in *Miller v. Johnson*, 515 U.S. 900, 911 (1995), when the Court stated that "*Shaw* recognized a claim 'analytically distinct' from a vote dilution claim." The parties have recognized this distinction throughout this case, as this Court noted in its congressional plan opinion. Docket no. 1339 at 122 ("All parties agree that an intentional vote dilution and a *Shaw*-type racial gerrymandering case are analytically distinct.").

This Court also recognized in its opinion on the congressional plan that the Supreme Court recently reaffirmed in *Alabama LBC* that a *Shaw*-type racial gerrymandering claim is "that race was improperly used in the drawing of the boundaries of one or more specific electoral districts." Docket no. 1339 at 30 (quoting *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (emphasis omitted)). The plaintiff's evidentiary burden in a *Shaw*-type claim is "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."

Alabama LBC, 135 S. Ct. at 1267. This Court further acknowledged that *Bethune-Hill v. Virginia State Board of Elections*, 137 S. Ct. 788 (2017), reaffirmed the basic racial predominance analysis explained in *Miller* and *Shaw II*, and the basic narrow tailoring analysis explained in *Alabama LBC*. Docket no. 1339 at 30 n.26. *Bethune-Hill* considered only *Shaw*-type racial gerrymandering claims, not vote dilution claims.

The Supreme Court developed the predominance test to determine whether voters were being placed into districts on the basis of race as opposed to traditional districting principles. Although the parties have argued over whether certain language from the *Shaw* line of cases is relevant to and can be applied to the vote dilution analysis, no party, witness, or expert has asserted that the predominance test applies to Plaintiffs' vote dilution claims. Defendants argue that racial discrimination must have been a cause in fact of the legislative action, but they agree with Plaintiffs that the test is whether racial discrimination was a substantial or motivating factor behind enactment of the law. Docket no. 996 (Defendants' Motion for Summary Judgment) at 5-6, 12 ("The question is whether intentional racial discrimination was a substantial or motivating factor in the enactment of the . . . plans and, if it was, whether those plans would have been enacted in the absence of a discriminatory purpose.").

In the congressional plan opinion, this Court agreed that "statements made about determining motive in the *Shaw*-type cases can have application to intentional vote dilution cases, even though *Shaw*-type cases involve a different motive than intentional vote dilution cases" because "[w]hether partisanship provides an explanation

for the specific lines that were chosen is relevant to both motive inquiries." Docket no. 1339 at 122-23. However, while the issue of race predominance must be determined in a Shaw-type claim, intentional vote dilution may be found when race motivated the districting decision, along with other factors. Regardless of whether political motives also played a part or even dominated, if racial discrimination was a motivating factor for the legislative action and the other criteria for an intentional vote dilution claim are satisfied, the districting decision violates the Constitution.

VI. Summary

With regard to the § 2 results claims, the Court finds that remedied claims are moot (specifically in El Paso, Bexar, and Harris Counties). With regard to non-remedied claims, the Court finds that Plaintiffs have either failed to prove a § 2 results claim as to Plan H283 or that such claims are best resolved in the 2013 plan case.

With regard to the intentional vote dilution claims under § 2 and the Fourteenth Amendment, the Court finds that Plaintiffs proved their claims in El Paso County (HD78), Bexar County (HD117), Nueces County (the elimination of HD33 and the configuration of HD32 and HD34), HD41 in the Valley, Harris County, western Dallas County (HD103, HD104, and HD105), Tarrant County (HD90, HD93), Bell County (HD54), and with regard to Plan H283 as a whole.

With regard to the *Shaw*-type racial gerrymandering claims, the Court finds that only the Task Force alleged such claims, and its claim against HD117 in Bexar County succeeds but its claim against HD77 and HD78 in El Paso County does not.

With regard to the one person, one vote *Larios*-type claims, the Court finds that Plaintiffs' statewide claims fail, but they succeed in proving violations in the Nueces County districts (HD32 and HD34), the Hidalgo County districts (HD31, HD36, HD39, HD40, and HD41), and the Bell/Lampasas County districts (HD54 and HD55).

SIGNED on this 20th day of April, 2017.

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

/s/
ORLANDO L. GARCIA
CHIEF UNITED STATES DISTRICT JUDGE

JERRY E. SMITH, Circuit Judge, dissenting:

For Texas Democrats, 2010 was a perfect storm. The nationwide Republican surge, whether attributable to the Tea Party movement or otherwise, played out on the big screen in Texas, resulting, as the majority recognizes, in a colossal increase in the number of Republicans elected to the Texas House of Representatives and unexpected wins by Republicans in the Texas Congressional delegation. That was timed ideally with the fact that the November election was followed immediately by the results of the 2010 decennial census and redistricting. The 2011 Legislature squeezed every conceivable ounce of advantage from this coincidence, making every possible effort to maximize the number of Republicans to be elected and re-elected in 2012 and beyond.

This litigation followed. The core question is whether the redistricting was lawful as an exercise of political power won in fair biennial elections or, instead, was in violation of the Voting Rights Act ("VRA") and the Constitution. At one point in their impressive opinion, the judges in the majority correctly find

> that Plaintiffs have failed to prove intentional vote dilution . . . . Specifically, they have failed to show that mapdrawers acted with an intent other than maintaining their Republican districts or that they used race for partisan advantage. Because of the high correlation between race and party, splitting Democrats, eliminating Democratic districts, and shoring up districts for Republican incumbents

> necessarily affects minorities, but that alone is not intentional vote dilution based on race.

Majority op. at 66. But alas, that announcement is made only in regard to "cracking claims in northeast Dallas County." Because it more properly should be applied to the entirety of the state House and Congressional redistricting, I respectfully dissent.

Despite its exhaustive and careful examination of the record, the majority commits grave error in its recitation of redistricting law, so its findings of fact based on that misreading do not enjoy the protection of the clearly-erroneous standard. And even under the clearly-erroneous test, the majority's findings are fatally infected, from start to finish, with the misunderstanding that race, rather than partisan advantage, was the main reason for the Congressional and state house districts drawn in 2011.[1]

Despite its honorable intentions, the majority concocts the most extreme possible reading of the raw record to justify findings that, if converted to corresponding remedies, will hand these plaintiffs pretty much everything they have sought, causing a wholesale revision

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[1] The exception is Part IV of the majority opinion, regarding the one-person-one-vote claims based on population deviation, with which I concur. As the majority convincingly demonstrates, in the redistricting process the State erred in assuming, without support in the law, that the ten-percent test offers an unassailable safe haven. I also agree with the ruling on standing.

in the State House and Congressional maps. In 2011, I warned that

> [t]he judges in the majority, with the purest of intentions, have . . . produced a runaway plan that imposes an extreme redistricting scheme for the Texas House of Representatives, untethered to the applicable caselaw. The practical effect is to award . . . a slam-dunk victory for the plaintiffs . . . at the expense of the redistricting plan enacted by the Legislature . . . .

Perez v. Perry, 835 F. Supp. 2d 209, 218 (W.D. Tex. 2011) (Smith, J., dissenting). The majority there erred. The Supreme Court promptly and unanimously vacated and remanded. *Perry v. Perez*, 132 S. Ct. 934 (2012) (per curiam).

In the intervening five years, apparently nothing much has changed in terms of the majority's view of who wins and loses.[2] Granted, there have been extensive proceedings, resulting in a massive record, and the procedural posture is much different from what it was in 2011–12. Nonetheless, the majority's jaundiced perspective of the Texas Legislature and its minions seems fixed. We will see how it fares on ultimate appeal.

In this opinion, I will reiterate that because of mootness, this court is without jurisdiction in regard to the 2011 state House and Congressional plans. I will show how the majority is wrong on the law. And I will

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[2] The majority's enthusiasm for the plaintiffs' case is shown by the fact that, in at least one instance, it even invents a claim that the plaintiffs missed—what it believes is "a clear *Shaw*-type racial gerrymandering claim." Majority op. at 57 n.46.

demonstrate that the majority's factual findings are so extreme as to defy logic and reason under this record.

I. Mootness deprives this panel of jurisdiction.

In dissenting from the majority's March 10, 2017, opinion on the 2011 Congressional plan,[3] I showed that the proceedings for the 2011 Congressional and State House plans are moot under the binding authority of *Davis v. Abbott*, 781 F.3d 207 (5th Cir.), *cert. denied*, 136 S. Ct. 534 (2015). Nothing has changed to fix that fatal defect. Like all district courts, this court has an obligation to examine its own jurisdiction. This panel should promptly dismiss the 2011 suit for want of jurisdiction. Had it done so in 2015, when certiorari was denied in *Davis*, these proceedings would be much further advanced.

II. The majority misreads the applicable law.

Reduced to its barest essentials, the key question of law (assuming this is not moot) is whether plaintiffs have established that the legislature employed "race for its own sake." As recently as March 2017, the Supreme Court has repeated that the answer is "no."

As I showed in my recent dissent on the 2011 Congressional maps,[4] the elephant in the room is *Bethune-Hill v. Virginia Board of Elections*, 137 S. Ct. 788 (2017). There the Court twice repeats the test, quoting *Miller v. Johnson*, 515 U.S. 900, 913 (1995), that plaintiffs must prove "that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale." *Bethune-Hill*, 137 S. Ct. at 798.

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[3] *See Perez v. Abbott*, 2017 U.S. Dist. LEXIS 35012, at *243–263 (W.D. Tex. Mar. 10, 2017) (Smith, J., dissenting).

[4] *See id.* at *266–270 (Smith, J., dissenting).

"[R]ace for its own sake" must be "the overriding reason for choosing one map over others." *Id.* at 799. And how do we know whether "race for its own sake" drives a redistricting decision? It occurs when "race was the criterion that, in the State's view, could not be compromised." *Id.* at 798 (citation omitted).

Under *Bethune-Hill*, a legislative decision is suspect when it treats a person of color or of a certain ethnicity differently for no reason other than race, based on some reprehensible basis such as perceived inferiority or on a theory that persons are essentially different because of race. Thus, a retailer in the Deep South in 1960 might turn away black customers, regardless of how well they are dressed, how they behave, or how much money they wish to spend, on no basis other than race. Or, in the electoral context, a minority voter, to register, might be required to satisfy extra requirements for the sole reason of race and not because of his or her legal qualifications or how he or she is likely to vote.

To be sure, there is raw "race for the sake of race" in this record, but not from state actors or their witnesses. As the majority's findings on the 2011 Congressional redistricting state (pages 369–72), Congressman Al Green, an African-American Democrat, as well as plaintiffs' expert Dr. Richard Murray, testified to complain that Green's Houston-area district, CD9, was initially drawn with "a clear African-American plurality, but at the time of redistricting Hispanic total population was beginning to exceed the Black population." In the 2011 plan, CD9 "gain[ed] heavily Latino and upscale areas" (which can only be a proxy for "white people"), "which might change the *character* of the district as an African-American district as the area develops."

(Emphasis added.) Those witnesses said this "could create tension," and "the addition of upscale communities . . . [in currently undeveloped plots] will likely produce an influx of Anglos . . . ."

The obvious point is that the potential new Hispanic and Anglo residents were singled out because of "race for its own sake." Congressman Green, with commendable candor, was sending the message that he did not want more Anglo or Hispanic folks in his district because, being (in his view) different on account of race, they would change the "character" of the district. One shudders to think what the reaction would be if an Anglo legislator had testified that he preferred not to have minority families moving into undeveloped parts of his district because of their "character" or essential "nature."

"Race for its own sake" was also shown in Dallas. As the majority recounts in its Congressional findings (page 375), CD30 African-American Democrat Congresswoman Eddie Bernice Johnson, also with candor, referred approvingly to Black voters who "want to be able to identify some of the people that look like them, that think like them, that live with them, to represent them." "[W]hen they see an opportunity to represent themselves with someone who looks like them, that is what they want . . . ." That is a stark example of "race for its own sake," but it cannot be attributed to the State defendants or their agents.

Back to the law. The issue is whether the Legislature drew lines for reasons of "race for the sake of race" or, instead, for reasons of politics. The issue is complicated, for example, by whether there are limits to non-racial partisan gerrymandering and by the extent to which, if

any, a given record reflects the use of partisanship as a proxy for race.

To analyze this crucial issue, I rely, in part, on a new essay by Professor Richard L. Hasen of the University of California, Irvine School of Law, entitled "Race or Party, Party as Race, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases."[5] Though Professor Hasen zealously advances his policy preferences as an advocate for more aggressive application of the VRA and Equal Protection Clause, his recitation of the law and his analysis of possible outcomes are resourceful and evenhanded.

Professor Hasen discusses what has been called "conjoined polarization," defined as "[t]he more consistent alignment of race, party, and ideology since 1965."[6] Importantly, he acknowledges that "legal doctrine has not yet found a comfortable way to deal with it."[7] Indeed, that is the challenge in the instant case. There are significant clues from various Supreme Court decisions, culminating, as I have said, in *Bethune-Hill*'s reiteration of the "race for its own sake" test. The appeal of this court's ultimate judgment will give the Supreme Court the opportunity to be more precise in explaining—with the 2020 decennial census on the horizon—how much latitude legislatures have to fashion districts for purely

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[5] Legal Studies Research Paper Series No. 2017–18, preliminary draft, Feb. 6, 2017, forthcoming in William & Mary Law Review (2018) (symposium), abstract available at https://ssrn.com/abstract=2912403.

[6] Hasen, text accompanying note 5 (quoting Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO STATE L.J. 867, 869 (2016)).

[7] *Id.*, text accompanying notes 6–7.

political purposes, to take advantage of earned wins at the ballot box, where racial considerations play a part in the process and where (as always) compliance with the VRA and the Constitution is paramount.

Professor Hasen presents three possible approaches that the Supreme Court could adopt: (1) "race or party"; (2) "party as race"; and (3) "party all the time." Professor Hasen is least fond of the first, although, as I will discuss, that is the exegesis most consonant with Texas's electoral landscape and, more importantly, is the methodology that the en banc Fifth Circuit has announced without using that nomenclature.

For "race or party," "a court's task is to decide whether a case is 'really about race rather than party.'"[8] As Professor Hasen candidly admits, if the task is to decide whether the legislature acted on the basis of race *or* party, redistricting plaintiffs "most importantly"[9] must confront *Easley v. Cromartie*, 532 U.S. 234 (2001). Unaware of Professor Hasen's writings, I nonetheless noted *Cromartie*'s centrality in my congressional dissent, observing that the Court found no error where "the legislature drew boundaries that, in general, placed more-reliably Democratic voters inside the district, while placing less-reliable Democratic voters outside the district."[10]

That is the situation here, which Professor Hasen recognizes but this panel majority does not. He

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[8] *Id.*, text accompanying notes 7–8.

[9] *Id.*, text accompanying note 36.

[10] *Perez*, 2017 U.S. Dist. LEXIS 35012, at *270 (Smith, J., dissenting) (quoting *Cromartie*, 532 U.S. at 252). Although *Cromartie* is a racial-gerrymandering case, it nonetheless squarely addresses the choice of "race *or* party" in redistricting.

appropriately quotes (but without approval) the State's August 5, 2013, brief in the instant case:

> DOJ's accusations of racial discrimination are baseless. In 2011, both houses of the Texas Legislature were controlled by large Republican majorities, and their redistricting decisions were designed to increase the Republican party's electoral prospects at the expense of the Democrats. It is perfectly constitutional for a Republican-controlled legislature to make partisan districting decisions, even if there are incidental effects on minority voters who support Democratic candidates.[11]

Professor Hasen seems to acknowledge that, in light of Texas's argument here, *Cromartie* means trouble for the instant plaintiffs. "It is not as though the Court in [*Cromartie*] was unaware of creeping conjoined polarization."[12] "Texas's argument follows a statement [from] the precursor to [*Cromartie*]: '[A] jurisdiction may engage in constitutional political gerrymandering, even if it happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact.'"[13]

At least two other binding precedents are steep barriers to these plaintiffs, given the undeniable fact of conjoined polarization in Texas. The first is the Texas redistricting decision in *Bush v. Vera*, 517 U.S. 952 (1996).

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[11] Hasen, text accompanying note 88 (quoting State's brief at 19).

[12] *Id.*, text accompanying note 37.

[13] *Id.*, text accompanying note 89 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)).

In what Professor Hasen calls the "principal opinion,"[14] Justice O'Connor boldly stated that "[i]f district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify." *Id.* at 968 (opinion of O'Connor, J.).

Second is *LULAC v. Clements*, 999 F.2d 831, 854 (5th Cir. 1993) (en banc), in which the Fifth Circuit (by which, as the majority reminds us, we are firmly bound) held that "[Section] 2 is implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats." As Professor Hasen explains, "The court pointed to this fact and the support of minority candidates by party members of each party[15]as a reason for treating race and party as separate categories, even while acknowledging that '[m]inority voters . . . have tended to support the Democratic Party.'"[16] Thus, the Fifth Circuit has recognized facts that constitute conjoined polarization in Texas and has squarely adopted the "race or party" approach as the correct methodology: As Professor Hasen explains, "Since . . . *Clements*, conjoined polarization has only increased in the state of

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[14] *Id.* note 37.

[15] Importantly, several of the districts most hotly disputed in the Texas 2011 redistricting litigation are districts in which the Republicans, in recent elections, have nominated and supported minority candidates. Examples are African-American Republican Congressman Will Hurd in CD23; Hispanic Republican Congressman Francisco Conseco in CD23; Hispanic Republican Representative Aaron Peña in HD41; Hispanic Republican Jose Aliseda in HD35, and Hispanic Republican Representative John Garza in HD117.

[16] Hasen, text accompanying note 74 (quoting *LULAC v. Clements*, 999 F.2d at 854).

Texas, rendering the factual premise that race and party can be separated in Texas more dubious."[17]

In summary, in light of conjoined polarization in Texas, the disjunctive "race or party" formulation is the proper understanding of the law. If that were not otherwise obvious, it is compelled by *Bethune-Hill*, *Easley v. Cromartie*, and *LULAC v. Clements*. But because the judges in the majority seem not to embrace it, I will discuss the other two approaches briefly.

Moving from "race or party," Professor Hasen describes the second approach, "party as race," as "treat[ing] party as a proxy for race, equating proof of discriminatory partisan intent with proof of discriminatory racial intent."[18] We need not dwell for long on this formulation, because "[t]he Fifth Circuit in [*LULAC v. Clements*] . . . rejected the view that partisanship can serve as a proxy for race, viewing partisanship and racial discrimination as two discrete categories."[19] The en banc Fifth Circuit therefore "rejected the argument that 'the Republican and Democratic Parties are proxies for racial and ethnic groups in Texas'" as well as the notion that "'"partisan politics" *is* "racial politics."'"[20] And, as already shown, "'*[p]arty as race*'" [was] denied by the Supreme Court in *Hunt v. Cromartie* . . . ."[21]

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[17] *Id.*, text accompanying note 75.

[18] *Id.*, text accompanying note 9.

[19] *Id.*, text accompanying note 90.

[20] *Id.*, text accompanying note 71 (quoting *LULAC v. Clements*, 999 F.2d at 860).

[21] *Id.*, text accompanying note 125.

That leaves us with the third explication, "party all the time."[22] It

> deal[s] with the problem of conjoined polarization [by litigating] these cases not as race cases but as party cases, having courts rule that certain partisan actions are themselves illegal. Thus, rather than making partisanship or incumbency protection *a defense* in cases of racial gerrymandering, vote dilution, or vote denial, such conduct would make out a *prima facie case for liability*.[23]

For Professor Hasen, this is admittedly not the law and is only one proposal on an articulately advanced wish list: He acknowledges that under his proposal, "[t]he achievement of partisan ends would not be considered a good reason [for legislative action,] as it appears to be in the redistricting context."[24] As a matter of strategy, "it often will be easier and more fruitful to try to attack the partisanship directly, relying on the racial litigation route only as a backstop."[25]

There would be no need to prolong this discussion of "party all the time," which amounts to "direct policing of

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[22] It strikes me that "party all the time" might be a good recruiting slogan for a college fraternity. But I digress.

[23] Hasen, text accompanying note 135.

[24] *Id.*, text accompanying note 143 (citation and internal quotation marks omitted). In fairness, I need to add that because of issues regarding judicial manageability, Professor Hasen is "ambivalent" on the efficacy of "party all the time" in redistricting, as distinguished from, e.g., registration and voter ID cases. *Id.*, text accompanying note 147.

[25] Hasen, text accompanying notes 152–153.

partisanship,"[26] except that the majority advances it in one discrete respect. In their opinions in both the 2011 Congressional and 2011 House cases, the judges in the majority exude discomfort with the indisputable fact that the 2011 Republican legislative majority took every possible partisan advantage of the super-majority it gained from the 2010 Republican sweep. The question for this panel is whether that exercise of raw political leverage is lawful, under the VRA and Constitution, even if many might see it as unfair or abusive of power.

I addressed the issue of partisan advantage in my dissent in the 2011 Congressional case. Regarding the Legislature's overt but unsuccessful attempt to unseat longtime Anglo Democrat Congressman Lloyd Doggett in the Austin area, I noted that "[a]n attempt to dislodge an incumbent political adversary should logically be viewed as a permissible redistricting principle," because a party's disadvantaging its political foes, for reasons not related to invidious purposes such as race, is not meaningfully different from the protection of that party's incumbents. *Perez v. Abbott*, 2017 U.S. Dist. LEXIS 35012, at *274 (Smith, J., dissenting). The majority disagreed, opining that unseating Doggett "ignor[ed] many if not most traditional redistricting principles." *Id.* at *177 (majority opinion).[27]

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[26] Hasen, text accompanying notes 148–149.

[27] At least one blogger was alarmed at my suggestion that legislative majorities should be allowed to treat adversaries as adversaries:

> Litigants should challenge the notion that "incumbency protection" includes an interest in "incumbency advantage." Holding otherwise quickly leads to a perverse and startling result. In his *Perez* dissent, for example, Judge Smith argued

In summary, the judges in the majority engage in a well-meaning and unintended misreading of the law. To be fair, there is some residual uncertainty from the Supreme Court's redistricting pronouncements over the past decades. One thing we can be sure of, however, is that as of March 2017, these plaintiffs must show that the legislature employed "race for its own sake." *Bethune-Hill*, 137 S. Ct at 798. The law forbids "the racial *purpose* of state action, not its stark manifestation." *Id.* (emphasis added, citation omitted). "Race for its own sake" must be "the overriding reason for choosing one map over others." *Id.* at 799.

III. The correct law applied to these facts.

It is on this explanation of "race for its own sake," issued by the Supreme Court just a few weeks ago, that the majority fatally stumbles. The majority is right only if

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that a state's interest in "incumbency protection" implies an interest [in] "incumbency advantage" and, therefore, a constitutional interest in "punishment of enemies [quoting the dissenting passage described above]." Voting rights advocates should forcefully challenge this line of reasoning. This "blood sport republic" logic is fundamentally incompatible with a constitutional framework that demands—at a minimum—a rational basis for state action. The "partisan advantage defense" should not shield racial sorting, and *Cromartie* (and its progeny) should not be extended to condone *illegitimate* uses of political data."

G. Michael Parsons, Is *Bethune-Hill* a Major Voting Rights Victory or the *Next Northwest Austin*?, available at https://moderndemocracyblog.com/2017/03/30/is-bethune-hill-a-major-voting-rights-victory-or-the-next-northwestaustin/. Mr. Parsons, a private attorney/blogger, at least agrees with me that "[i]f anything, *Bethune[-Hill]* took a step backwards" for redistricting plaintiffs. *Id.* n.15.

the State sought, as its ultimate end, not to exploit partisan advantage but, instead, to disadvantage voters (either in part or in whole) because they were members of a racial or ethnic class and were, for that reason, inherently unworthy of equal treatment under the law. By that approach, the State would be treating members of a minority as having a certain identifiable "character," possibly creating "tension," as shown above by the testimony for CD9. By the same notion, per the record quoted above for CD30, if the State had used "race for its own sake," it would have assigned voters together with "people that look like them that think like them, that live with them," instead of doing its best to ascertain voters' political affiliation in order to maintain numerical political hegemony.

The main flaw in the majority's reasoning is that it defies logical explanation. First, the record is absolutely devoid of indication that the Legislature treated race *qua* race; instead, it is replete with examples (possibly hundreds of them) of decisions made, and actions taken, to advance the Republican majority, whether in a quest to retain power for its own sake or to advance policy goals favored by one party and opposed by the other.

Every crime requires a motive. No reason is advanced as to why or how it would have made sense for the legislative majority to disadvantage minority voters because they were minority voters, as the law requires the plaintiffs to show. Nothing in this record reflects partisanship as a proxy for race. If it did, that would mean that the legislators cared less about Republican strength than about racial disparagement—that, in fact, in the 2011 Texas Legislature, political considerations played second fiddle to racial division: The stated objective was partisan

power, but the real and secret goal was subjugation of minorities. It is indeed possible to imagine a world—maybe the Deep South in the 1920s—in which the main guidance for legislative action was racial hatred or prejudice. But to their credit, these private plaintiffs make no such claim, nor do my distinguished colleagues in the majority believe it. This is not "race for the sake of race."

The majority may predictably respond that I have it backwards: that the issue is not whether political party was a proxy for race, but the flipside: whether race was a proxy for partisanship.[28] That is to say, the plaintiffs and the majority seem to take the position that even assuming that the ultimate purpose was the non-invidious goal of maintaining partisan strength, race was often used in drawing lines, in the knowledge that the result of a given boundary change would likely be an increase in Republican electability. Thus, the majority posits that, for example, "turning on racial shading" in the computerized redistricting program is seldom or never acceptable, because race is the hidden reason a particular change (such as breaking a precinct) is made, and though the real and stated goal is purely partisan, the voters left in or out of the precinct are being so treated because of some stereotypical characteristic that is calculated to equate with political party.

The difficulty with this reverse-proxy construct is that it is still not "race for the sake of race." The correct construct is dictated by *Cromartie*, in which such "precinct swapping," 532 U.S. at 257, was center stage. The test is whether the Legislature's decision "is

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[28] *E.g.*, Majority Op. at 137 ("race as a proxy for partisanship").

unexplainable on grounds other than race." *Id.* at 242 (citations omitted). "Caution is especially appropriate in this case, where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated." *Id.*

Importantly, in *Cromartie* the Court approved of a precinct split that "plac[ed] the more heavily African-American segment [of the precinct] within [the challenged district]." *Id.* at 248. The Court accepted, with apparent approval, the testimony of a state expert "that African-Americans are more reliable Democrats than whites." *Id.* at 262. And in *Bethune-Hill*, the Court most recently reminds us that instead of focusing on a minuscule change at a precinct boundary, "[t]he ultimate object of the inquiry . . . is the legislature's predominant motive for the design of the district as a whole . . . . [A]ny explanation for a particular portion of the lines, moreover, must take account of the districtwide context." *Bethune-Hill*, 137 S. Ct. at 800.

In *Cromartie*, "the [Democrat-dominated] legislature drew boundaries that, in general, placed more-reliably Democratic voters inside the district, while placing less-reliable Democratic voters outside the district." *Cromartie*, 532 U.S. at 252. The three-judge district court, agreeing with plaintiffs' expert, declared that "race is the predominant factor." *Id.* at 249. "But this statement of the conclusion is no stronger than the evidence that underlies it." *Id.* "Conclud[ing] that the District Court's . . . findings are clearly erroneous," the Supreme Court reversed. *Id.* at 258. The same should obtain here.

IV. The majority's flawed reasoning.

Faced with its perceived task of deciding whether race predominated in the 2011 Legislature's redistricting decisions, the majority embarks, as I have said, on an impressive recitation of the record. But it gives inadequate nod to legitimate political aims and traditional redistricting principles and, instead, rests much of its decree on finding that various state witnesses presented testimony that it calls "not credible."[29]

The seriousness of the majority's implied allegation cannot be overstated. In its impressively detailed explanation, it weaves a complex, widespread conspiracy of scheming and plotting, by various legislators and staff, carefully designed to obscure the alleged race-based motive in an effort to achieve their objectives and—by necessary implication—intentionally[30] to deprive minority citizens of their political and civil rights.[31]

A representative example, though by far not the only one, is the majority's critique of the redistricting of House districts touching Nueces County. Here is the plot that the majority uncovered:

> Because Nueces County was less than 50% SSVR, it was mathematically impossible to draw two

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[29] The majority says "not credible" twenty-seven times (in its Congressional and House opinions and findings/conclusions), an astonishing number of times for a court to find that key witnesses misrepresented material facts under oath. And it finds what it calls "bad faith" nine times.

[30] The majority uses the word "intentionally" approximately one hundred times in the Congressional and House opinions and findings/conclusions.

[31] In its description of the allegedly nefarious enterprise, the majority uses forms of the word "manipulate" about forty-five times.

SSVR-majority districts within the County. However, mapdrawers knew that SSVR was typically lower, than HCVAP, that Nueces County had been over 50% HCVAP in 2000, and that Hispanic population had increased while Anglo population had declined, meaning they had every reason to believe that the HCVAP of Nueces County was over 50% even without more recent HCVAP data.

Moreover, Defendants' assertion that HCVAP data was not available is simply untrue. The HCVAP data was available to mapdrawers by April 21, 2011, before the map went to the floor, and would have shown that Nueces County HCVAP was over 50% .... Nevertheless, Interiano ... and other[s] ... continued to focus solely on SSVR .... [M]apdrawers did not explore whether to include more than two districts in Nueces County .... The ... facts ... concerning the decision to eliminate HD33 in Nueces County demonstrate intentional vote dilution. ... Mapdrawers intentionally did not consider whether § 2 required two districts in Nueces County, and used a false reliance on SSVR and the County Line Rule to justify their refusal to maintain two Latino opportunity districts in Nueces County. Further, they knew that HCVAP was the proper measure for a Latino opportunity district and had HCVAP data available before the map went to the floor, but insisted on using SSVR as the measure because SSVR was lower (and

lower than 50%) and it allowed them to argue that mathematically, two SSVR-majority districts could not be drawn. Although Nueces County was majority HCVAP and had been since at least 2000, they refused to consider whether two HCVAP-majority districts could be drawn wholly within the County. In addition, [they] steadfastly refused to consider whether the County Line Rule might have to yield to maintain two Latino opportunity districts in the area . . . [They] attempted to use § 5 as a shield for their failure to attempt compliance . . . . Mapdrawers chose two districts that were already performing reliably for Latino voters despite being under 50% SSVR . . . and raised their SSVR over 50% . . . . Mapdrawers and redistricting leadership relied in bad faith on a 50% SSVR standard . . . . [M]apdrawers acted in bad faith to thwart such claims by artificially inflating the number of HCVAP-majority districts . . . . [T]hey intentionally used [race] to *undermine* Latino voting opportunity. [M]apdrawers were likely using race to assign population [using ten precinct splits]. [They] intentionally packed Hispanic voters into HD32 to minimize their number and influence in HD34 and protect Hunter. [T]hey targeted low turnout minority areas and intentionally drew out potential Hispanic rivals . . ., again to protect the Anglo incumbent . . . [and] intentionally overpopulated HD32 (and underpopulated . . . HD34), without a legitimate justification.

> [T]he Court finds that redistricters intentionally diluted Latino voting strength by eliminating HD33 in Nueces County. Mapdrawers' use of race in HD90 and HD148 to "offset" this loss was not to comply with the VRA but to intentionally dilute Latino voting strength by (1) allowing redistricting leadership to claim that they were complying with § 5 despite eliminating HD33 and creating no new ability districts; (2) thwarting arguments that § 2 might require additional opportunity districts by artificially inflating the number of Latino-majority districts in the plan; and (3) racially gerrymandering and utilizing population deviations to further dilute the Latino vote in the remaining two Nueces County districts.

Majority opinion at 33–40 (some paragraph breaks omitted). Indeed, this complex conspiracy for Nueces County alone, affecting districts spanning hundreds of miles from Corpus Christi to Dallas/Fort Worth, would make Bernie Madoff proud.

To the contrary, however, if ever traditional districting principles should be respected—as countless Supreme Court decisions say they must—it is in Nueces County. As the majority admits, the County Line Rule and Nueces County are a perfect fit. Because the county proportionally lost population in relation to the rest of the state, it no longer qualifies for 2-plus districts but, by simple math, is entitled to 2.03 representatives. That is as close as it gets. The Legislature accordingly assigned Nueces County exactly two whole seats, and HD33 was sent packing to North Texas.

The only remaining question should be where, within the county, to draw the line between the two so as to comply with one-person-one vote. The majority goes well beyond that by complaining of the removal of HD33 and other ills. An ultimate decision to return CD33 to Nueces County would violate the most perfect fit of that rule in the entire state and would require, at the remedy stage, changes in myriad districts between Nueces County and the new HD33.

And that is just Nueces County. The same apparent perspective—that legislative leaders and staff plotted tirelessly, throughout the legislative session, to obscure the facts and violate the law—infects most of the majority's fulsome explanation.

V. Summary.

The law is, in some respects, unsure. For example, the Supreme Court will need to resolve the circuit split on whether to require coalition districts. And it will have opportunity to tackle the issue of partisan gerrymandering and to explain the limits, if any, to the exercise of partisan advantage. More refinement is needed to inform legislatures how to deal with the Scylla and Charybdis of meeting the requirements of Section 2 of the VRA without undermining equal protection or unduly violating traditional redistricting principles. And some higher court will need to tell this panel whether the 2011 proceedings are moot.

Despite these uncertainties, one thing is certain: Despite its heartfelt efforts, this panel majority has badly overreached in finding that Texas used race, instead of partisan advantage, as the predominant factor in the 2011

redistricting. A finding that racial considerations were "dominant and controlling"[32] defies everything about this record.

Is there anything to show that, as to any district whatsoever, "race was the criterion that, in the State's view, could not be compromised"?[33] Nary a word. I respectfully dissent.

Stay tuned.

/s/
JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

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[32] *Miller v. Johnson*, 515 U.S. at 913.

[33] *Bethune-Hill*, 137 S. Ct. at 798.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ; HAROLD DUTTON, JR.; GREGORY TAMEZ; SERGIO SALINAS; CARMEN RODRIGUEZ; RUDOLFO ORTIZ; NANCY HALL and DOROTHY DEBOSE	)	CIVIL ACTION CASE **11-CA-360-OLG-JES-XR** CONSOLIDATED ACTION [Lead case]
Plaintiffs	)	
v.	)	
STATE OF TEXAS; RICK PERRY, in his official capacity as Governor of the State of Texas; DAVID DEWHURST, in his official capacity as Lieutenant Governor of the State of Texas; JOE STRAUS, in his official capacity as Speaker of the Texas House of Representatives; HOPE ANDRADE, in her official capacity as Secretary of State of the State of Texas	)	
Defendants	)	

OPINION

On February 28, 2012, this Court issued PLAN H309 as the interim plan for the districts to be used to elect members in 2012 to the Texas House of Representatives. This opinion explains that plan.

I. Background.

The decennial census was conducted in 2010 pursuant to Article I, § 2 of the United States Constitution and showed that the population of Texas had increased 20.6%, from the 2000 population of 20,851,820 to 25,145,561 for 2010. The population changes mean that the current Texas House districts (the "benchmark plan") are malapportioned and in violation of the one-person, one-vote principle.[1] Thus, the State reapportioned seats. The 82nd Texas Legislature enacted House Bill 150, which implemented a new plan for the Texas House ("the enacted plan") that was signed into law on June 17, 2011.

Plaintiffs mount a number of constitutional and statutory challenges to the enacted plan in this Court under Section 2 of the Voting Rights Act ("the VRA") and the Fourteenth Amendment. The plaintiffs and the United States have also objected to "preclearance" of the enacted plan in the United States District Court for the District of Columbia ("the D.C. Court") under Section 5 of

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[1] *See Connor v. Finch*, 431 U.S. 407, 410 (1977) (announcing that the constitutional guarantee of one person, one vote requires districts to achieve population equality "as nearly. . . as is practicable") (quoting *Reynolds v. Sims*, 377 U.S. 533, 577 (1964); *Chapman v. Meier*, 420 U.S. 1, 22 (1975)).

the VRA.[2] The State sued in the D.C. Court to obtain preclearance of its enacted plan, and that suit is pending.[3]

Because the enacted plan cannot be implemented, and because the benchmark plan is concededly unconstitutional on account of population growth, this Court is left with the "unwelcome obligation," *Connor*, 431 U.S. at 415, of implementing an interim plan so that the 2012 elections may go forward. The Supreme Court has directed this Court to implement an interim plan by taking guidance from the enacted plan except in geographical areas in which the plan is legally defective. *Perry v. Perez*, 565 U.S.___, 132 S. Ct. 934, 941-42 (2012) (per curiam). Specifically, the Supreme Court has directed this Court to use the State's enacted map and voter tabulation district ("VTD")cuts except in areas in which the plaintiffs have either shown that there is a likelihood of success on the merits on their Section 2 and constitutional claims or that their Section 5 claims are "not insubstantial." *Id.* Accordingly, we analyze the various claims and defenses to the enacted plan under Sections 2 and 5 of the VRA and the Constitution.

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[2]Texas is subject to the preclearance requirements of Section 5 of the VRA, as amended and codified at 42 U.S.C. § 1973c. Until a state obtains preclearance for such a plan, the plan cannot be effective as law and cannot be implemented. *Clark v. Roemer*, 500 U.S. 653, 646 (1991).

[3]*Texas v. United States*, Civ. Ac. No. 1:11-CV-1303 (D.D.C. 2012).

II. Analysis of Claims.

A. Districts Left Undisturbed from the Enacted Plan.

Following the Supreme Court's direction to leave undisturbed any district that is free from legal defect, *id.* at 941, this Court's interim map for the Texas House configures 122 of the 150 districts in the identical manner as did the Legislature.[4] To the extent that legal challenges are levied against any of those districts, we preliminarily find that any Section 2 and constitutional challenges do not have a likelihood of success, and any Section 5 challenges are insubstantial. Nevertheless, we emphasize the preliminary nature of this order and that, except for the fact that PLAN H309 sets the districts for the 2012 elections, nothing in this opinion reflects this Court's final determination of any legal or factual matters in this case or the case pending in the D.C. Court.

B. Challenges to House District 41.

In Hidalgo County, the plaintiffs in this Court object to the configuration of the districts under one-person, one-vote. In addition, the Department of Justice ("DOJ") and intervenors in the D.C. Court have raised Section 5

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[4]The districts in the interim plan that are identical to their configuration in the enacted plan are House Districts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 119, 120, 121, 122, 123, 125, 126, 127, 130, 131, 132, 134, 135, 138, 139, 140, 141, 142, 146, 147, and 150.

challenges to House District 41 under theories of retrogression and discriminatory purpose. House District 41, located in Hidalgo County, is represented by a Democrat incumbent (Representative Gonzalez), and neighboring District 40 is represented by a Republican incumbent (Representative Pena), who had switched parties after winning the 2010 election. In an apparent effort to aid Pena's reelection, the State reconfigured HD 41 to take in almost all of the Republican-leaning precincts in the McAllen metropolitan area. More important, Pena's residence was placed in HD 41,[5] and Gonzalez's was put into HD 40, effectively switching their districts. As a result, if Gonzalez were to seek reelection, she would be forced to run in a district that contains only 1.5% of the population she has been representing, and if Pena were to seek reelection, he would run in a district that contains only 1.1% of the district he currently represents.

Most problematic is that enacted HD 41—the only district in Hidalgo County that has a realistic chance of electing a Republican—is substantially underpopulated (by 4.41% from the ideal district size), but the rest of the districts in the county are substantially overpopulated (2.83%, on average).[6] This apparently systematic

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[5]We sometimes abbreviate references to House districts as "HD xx."

[6]Enacted HD 41 is underpopulated by 7,399 persons, while adjoining Districts 36 and 40 were respectively overpopulated by 4,368 and 5,856. The districts adjoining HD 41, in addition to being more Democrat, are also more heavily Latino. The total Hispanic citizen voting age population ("HCVAP") in HD 41 is 72.1%, while the total HCVAP's in HD 36 and HD 40 are respectively 88.7% and 89.0%. The total Spanish-surname voter registration ("SSVR") in HD 41 is 63%, while the total SSVR's in HD 36 and HD 40 are respectively

overpopulation of Democrat districts and underpopulation of the one possible Republican district presents serious concerns under *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd mem. sub nom. Cox v. Larios*, 542 U.S. 947 (2004). Thus, the plaintiffs have a likelihood of success on the merits on their one-person, one-vote claims with respect to HD 41.

Because this Court's interim plan returns HD 41 to a performing ability district, and because it does not incorporate any portion of the State map that is allegedly tainted by discriminatory purpose, this Court need not reach the remaining claims.

C. Challenges to House District 35.

House District 35 in the benchmark plan extended into seven rural counties in South Texas. In the enacted plan, the Legislature reconfigured HD 35 by taking out three of those counties and adding three other rural south Texas counties. The DOJ has alleged in the D.C. Court that enacted HD 35 retrogresses minority voting strength in violation of Section 5. The intervenors further contend that the decision to keep HD 35 in rural South Texas instead of moving it further south to the Rio Grande Valley, an area of fast population growth with a high Latino population, evidences discriminatory purpose under Section 5. Finally, the plaintiffs in this Court allege that the configuration of HD 35 violates Section 2 and reflects intentional discrimination in violation of the Fourteenth Amendment.

85.1% and 85.8%. The total Latino population in HD 41 is 79.8%, while the total Latino population is 93.7% in HD 36 and 94.6% in HD 40.

To support its claim of retrogression, the DOJ cites its expert's conclusion that HD 35 performance was reduced from 40% to 20% in exogenous elections.[7] As further evidence of retrogression, the Department's expert also concludes that under the benchmark plan, HD 35 elected the minority-preferred candidate in 80% of endogenous elections. Because it appears that HD 35 in the enacted plan diminishes the ability of minorities to elect their candidate of choice, the claim of a Section 5 violation is not insubstantial.

This Court need not make a preliminary ruling on the Section 2 and intentional-discrimination claims, because restoring HD 35 to benchmark (or higher) "performance" levels and shifting the district south to the Rio Grande Valley (as plaintiffs requested) provide an appropriate remedy for those claims.

D. Challenges to House District 117.

In the D.C. Court, the DOJ and intervenors lodge Section 5 retrogression and discriminatory purpose objections to the configuration of HD 117. Specifically, they allege that the State intentionally reconfigured the district in an effort to trade mobilized Hispanic voters for Hispanic voters who do not regularly vote. They argue that as a result of these swaps, minorities are no longer able to elect the candidate of their choice.[8]

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[7]Under the index of the Texas Office of the Attorney General ("the OAG index"), performance decreased from 50% to 40% in exogenous elections.

[8]According to the DOJ's expert, benchmark HD 117 elected the minority-preferred candidate in 60% of endogenous elections. In

In 2010, HD 117 elected a Republican, Representative Garza, to the Texas House of Representatives. To protect him, the Legislature increased the Republican performance of the district. In achieving that end, however, the State may have focused on race to an impermissible degree by targeting low-turnout Latino precincts. Although the HCVAP increased from 58.8% to 63.8%, the SSVR decreased from 50.3% to 50.1%. The fact that the map drawers were able to increase the HCVAP substantially while simultaneously decreasing the proportion of registered voters with Spanish surnames indicates that they may have intentionally focused on precincts with low Latino turnout. This outcome, combined with Garza's statement in his deposition that he "wanted to get more Anglo numbers," is evidence that the decisionmakers were impermissibly focused on race in trying to make the district more Republican. Accordingly, the Section 5 claim is not insubstantial, and the Court has reconfigured HD 117 to return it to benchmark "performance" levels. Because we modify HD 117 to address the Section 5 intentional-discrimination issues, we need not reach the other claims regarding that district.

E. Challenges to House District 33.

The DOJ and intervenors in the D.C. court have objected to the configuration of Nueces County under Section 5. The plaintiffs in this case also raise Section 2 and Fourteenth Amendment objections. Under the 2000

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exogenous elections, the Department's expert concluded that performance decreased from 60% to 20%. Under the OAG index, performance in exogenous elections decreased from 50% to 20%.

Census, Nueces County had a large enough population for approximately two and a half districts. Because it was not possible to draw two districts wholly within Nueces County without violating one-person, one-vote principles, the benchmark plan included two Latino opportunity districts (HD 33 and HD 34) in its configuration, with the remaining population being shed into HD 32 in San Patricio County.

The 2010 Census revealed, however, that Nueces County, which had a population increase of about 8% over the past decade, grew substantially more slowly than the statewide average of about 21%. Because the Texas House has a static number of seats, that is the electoral equivalent of population loss for the county. As a result, Nueces County's population is currently only 2.02 times the ideal district size, meaning that two districts could be drawn wholly within Nueces County without either breaking the County Line Rule of the Texas Constitution or having impermissibly high population variations in violation of the U.S. Constitution. In other words, and by coincidence, two districts fit almost perfectly into Nueces County, with only a 1% deviation from the ideal size of a House district.

In the enacted plan, the State chose to eliminate one district in Nueces County, HD 33, moving it to Rockwall County in north Texas, which grew by almost 82% over the past decade. Because Nueces County does not have a majority SSVR as a whole, the choice to remove one district required the elimination of one of the Hispanic ability districts.

With regard to the Section 5 claim, any retrogression has been offset in the interim plan by the creation of a new

Hispanic opportunity district, HD 144, which we discuss below.[9] In addition, the Court cannot conclude, at this stage of the proceedings, that plaintiffs are likely to succeed on their Section 2 claim, because they must show that the totality of the circumstances justifies an additional Latino district in Nueces County even if all three *Gingles* preconditions are met. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

Based purely on total population, Nueces County is only entitled to 2.02 districts, and the only way to maintain two Latino districts in Nueces County is to cut a county line in violation of the State constitution. Absent a Section 5 retrogression violation, this seems inappropriate in the particular circumstances of this case. This is not to say that Section 2 of the VRA could never require a county line cut. This Court can envision a situation in which the refusal to cut a county line could, even in the absence of discriminatory purpose, result in vote dilution. However, in the particular circumstances of this case, traditional redistricting principles counsel in favor of maintaining two districts in Nueces County.

F. Challenges to House District 144.

Located in far eastern Harris County, the benchmark HD 144 was an Anglo-citizen majority district with a large and growing Hispanic population (35% HCVAP). Indeed, the Hispanic population across Harris County has

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[9]To the extent any of the intervenors raises a Section 5 challenge in the D.C. Court based on discriminatory purpose, this Court is unable to conclude, based on the evidence presented, that any intervenor has met the standard imposed by the Supreme Court.

increased significantly over the previous decade, while the Anglo population has declined. In the enacted plan, the State adjusted HD 144 in a manner that reduced the HCVAP to 31%, thus likely making the district safer for its Republican incumbent, Representative Legler. The plaintiffs allege that Section 2 required the State instead to reconfigure HD 144 so that it would contain a majority HCVAP such that Hispanics will have the opportunity to elect the candidate of their choice.

The Court concludes that the plaintiffs have demonstrated a likelihood of success on the merits of their Section 2 claim in eastern Harris County. First, the plaintiffs presented numerous demonstration maps to this Court, and during the legislative session, illustrating that an additional compact majority HCVAP district is possible in eastern Harris County. Second, the plaintiffs have submitted a number of expert reports analyzing whether racially polarized voting exists in Texas, and also specifically whether it exists in Harris County. Based on these reports and on the testimony of the plaintiffs' experts, the Court concludes that the plaintiffs have preliminarily established that racial block voting and cohesive voting patterns exist in Harris County.

Finally, the Court preliminarily concludes that the creation of a new Latino district in eastern Harris County is justified by the totality of the circumstances. Over the past 10 years, minority growth in Harris County has increased by over 700,000, while Anglo population decreased by more than 82,000. Latinos constitute 23% of the citizen voting age population ("CVAP") in Harris County but are the voting majority in only 17% of the districts in the enacted plan. Moreover, a significant

amount of evidence was presented to the Court regarding historical racial discrimination in Texas. For these reasons, the Court concludes that the plaintiffs have shown a likelihood of success on their claim that Section 2 requires the creation of a Latino opportunity district in eastern Harris County.

This Court has reconfigured HD 144 in the same general manner as the plaintiffs request. The Court's configuration also offsets the elimination of a minority-opportunity district in Nueces County. *See Texas v. United States*, 2011 WL 6440006, at *17 (D.D.C. Dec. 22, 2011) (indicating that new ability districts may offset any lost ability districts).

G. Challenges to House District 149.

Based purely on population, Harris County is entitled to 24.4 districts; but, in the benchmark map Harris County had 25 districts, which was purportedly the result of a legislative compromise to allow for greater minority representation. The enacted plan reduced the number of districts to 24. The Legislature chose to dismantle HD 149, represented by Democrat Representative Vo, the first and only Vietnamese-American legislator in the Texas House. His residence was placed in HD 137, a minority coalition district represented by fellow Democrat Representative Hochberg. The new HD 149 was moved to fast-growing Williamson County, in central Texas, in the enacted plan.[10] As a result, enacted HD 149 does not allow minorities the ability to elect the candidate

[10]Over the last decade, Texas grew by 20.6%, Harris County by 20.3%, and Williamson County by 69.1%.

of their choice. The plaintiffs contend that the change violates Section 2 of the VRA and the Fourteenth Amendment. The DOJ and intervenors also raise Section 5 retrogression and discriminatory purpose challenges in the D.C. case.

It is difficult to imagine a legislative district more diverse than what HD 149 was in the benchmark plan: a CVAP of 38% Anglo, 26% Black, 19% Hispanic, and 16% Asian. Voters and political activists residing in benchmark HD 149 testified that a coalition of voters from all four major ethnicities in the district worked together to elect Vo in 2004 and to reelect him since. Because Vo is likely the minority candidate of choice of one or more minorities in benchmark HD 149, the district could be considered either a "coalition district" or a "crossover" district. *See Bartlett v. Strickland*, 556 U.S. 1, 13 (2009). The D.C. Court has indicated that Section 5 protects such districts from retrogression, *Texas v. United States*, 2011 WL 6440006, at *18-19, so the Section 5 case with respect to HD 149 and its effect on statewide retrogression is not insubstantial. As a result, we make no determination with respect to the other claims as to HD 149.

H. Challenges to House Districts 77 and 78

In El Paso County, the intervenors[11] in the D.C. Court have alleged that the line between HDs 77 and 78 was drawn with discriminatory purpose. The plaintiffs in this Court also allege that the El Paso configuration violates

[11]The DOJ expressed its opinion during this Court's February 14, 2012, hearing that the intervenors' discriminatory purpose claim for El Paso is not insubstantial.

Section 2 of the VRA and is intentionally discriminatory under the Fourteenth Amendment. That line is indeed bizarre, even for a legislative district. District 77 has two "deer antler" protrusions that reach into HD 78 and grab predominantly Latino neighborhoods. The protrusions have the effect of concentrating Latinos into District 77, protecting a Latino Republican incumbent, Representative Margo, in District 78.

Although it is difficult to tell whether those lines were drawn on partisan or racial lines, the high number of split precincts in the protrusions increases the likelihood that the map-drawers were focused on race because partisan voting data are not available below the precinct level. The State has not offered any explanation why the precincts were split, so we conclude that plaintiffs have presented a Section 5 claim that meets the low "not insubstantial" standard. Because the court-ordered remedy with regard to the Section 5 discriminatory purpose claim also provides an appropriate remedy for the alleged Section 2 and Fourteenth Amendment violations, the Court need not reach those issues.

III. The Interim Texas House Plan.

In summary, this Court's plan, H309, obeys the Supreme Court's directive by adhering to the State's enacted plan except in the discrete areas in which we have preliminarily found plausible legal defects under the standards of review the Court has announced. In the interim plan, we correct those perceived defects by taking guidance from the State's valid political considerations as reflected in the enacted plan. *See Perez*, 132 S. Ct. at 941.

In South Texas, H309 equalizes the population deviations in Hidalgo County while restoring HD 41 largely to its benchmark configuration, making necessary adjustments resulting from population shifts. This Court's interim plan also moves HD 35 from rural South Texas into the Rio Grande Valley, where it will be a performing minority ability district. In Harris County, HD 149 is restored, and in its stead, HD 136, a 75% Anglo district represented by retiring Republican Representative Woolley, is moved to another part of the state. Further, any changes in this area are made so as to not affect the ability of minorities in neighboring districts, such as HD 137, to elect the candidate of their choice. On the east side of Harris County, HD 144 is substantially reconfigured so that it contains a majority HCVAP and is likely to elect the Latino candidate of choice. Finally, in El Paso County, the Court addresses the intentional discrimination allegation by retracting HD 77's "antlers" somewhat, making the districts more compact. The effect is to increase District 78's HCVAP to 58.3% and to provide minorities the ability to elect the candidate of their choice.

All other districts in the enacted plan are unchanged unless an alteration is required by changes to adjoining districts. Thus, in sum, 122 districts in this Court's interim plan are exactly the same as those in the enacted plan; 7 districts have been altered minimally; and 21 districts have been altered substantially.

IV. Conclusion.

We emphasize the preliminary and temporary nature of the interim plan, ordered in adherence to the standards

set forth by the Supreme Court in this very case, as we undertake our "unwelcome obligation"[12] mindful of the exigent circumstances created by the need for timely 2012 primaries and general elections in Texas. Nothing in this opinion explaining this Court's independently drawn PLAN H309 represents a final judgment on the merits as to any claim or defense in this case.

It is hereby ORDERED that Plan H309 be used on an interim basis as the redistricting plan for the 2012 elections for the Texas House of Representatives.

SIGNED on this 19th day of March, 2012.

/s/
JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

/s/
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

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[12] *Perez*, 132 S. Ct. at 940 (quoting *Connor*, 431 U.S. at 415).

APPENDIX E

In the United States District Court for the Western District of Texas

SHANNON PEREZ, ET AL.	§	
	§	
v.	§	SA-11-CV-360
	§	
GREG ABBOTT, ET AL.	§	

ORDER ON PLAN C235

Before Circuit Judge SMITH, Chief District Judge GARCIA, and District Judge RODRIGUEZ

This Order addresses Plaintiffs' statutory and constitutional claims against Plan C235, enacted by the 83rd Texas Legislature in 2013.

The following Plaintiffs assert claims against Plan C235 in this consolidated case: the Mexican American Legislative Caucus ("MALC"),[1] the NAACP Plaintiffs,[2]

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[1] MALC is a non-profit Latino legislative caucus established to serve the members of the Texas House of Representatives and their staffs in matters of interest to the Mexican American community of Texas. Docket no. 897 ¶ 18. MALC-1 is a list of current MALC members.

[2] The NAACP Plaintiffs include the Texas State Conference of NAACP Branches, an association of local chapters of the NAACP, Howard Jefferson, and Rev. Bill Lawson. Individual Plaintiff Juanita Wallace passed away in 2016. According to the affidavit of Carmen Watkins, Regional Director for Region VI of the National NAACP, the Texas NAACP has well over 10,000 members and members who are registered to vote in almost every county. NAACP-1. She further

the African-American Congresspersons Plaintiffs,[3] the League of United Latin American Citizens ("LULAC") Plaintiffs,[4] the Rodriguez Plaintiffs,[5] the Quesada

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attests that "the NAACP has at least one branch in each of the implicated counties," 884 members in Tarrant County, 320 members in Bell County, 1,232 members in Harris County, and 147 members in Fort Bend County. *Id.* She further states that she reviewed the official membership lists in each of those counties and determined that there are members who reside in CD9, CD18, CD30, CD33, and House districts 100, 109, 110, and 111 (Dallas County), 95 and 101 (Tarrant County), 54 and 55 (Bell County), and 26 and 27 (Fort Bend County). *Id.*

[3] Eddie Bernice Johnson (CD30), Sheila Jackson Lee (CD18), and Alexander Green (CD9).

[4] The LULAC Plaintiffs include LULAC and individual members Gabriel Rosales, Belen Robles, Ray Velarde, Johnny Villastrigo, Bertha Urteaga, Baldomero Garza, Marcelo H. Tafoya, Raul Villaronga, Asenet T. Armadillo, Elvira Rios, and Patricia Mancha. LULAC has members who are registered to vote in most counties in Texas, including Dallas, Tarrant, Harris, Bexar, Nueces, and Fort Bend Counties. Docket no. 1302-1. LULAC submitted the affidavit of Elia Mendoza, Texas LULAC State Director, who attested that "there are multiple members of LULAC who are eligible voters in each of the Congressional and State Legislative Districts involved in this litigation." *Id.*

[5] Eddie Rodriguez, Milton Gerard Washington, Bruce Elfant, Balakumar Pandian, Alex Serna, Sandra Serna, Betty F. Lopez, David Gonzalez, Beatrice Saloma, Lionor Sorola-Pohlman, Eliza Alvarado, Juanita Valdez-Cox, Jose Martinez, Nina Jo Baker, Travis County, and the City of Austin.

The LULAC Plaintiffs, Perez Plaintiffs, and Rodriguez Plaintiffs have submitted joint briefing as "Joint Plaintiffs" on the congressional plan. Accordingly, the Court will consider their claims together unless necessary to consider them individually. The Perez Plaintiffs include Shannon Perez, Gregory Tamez, Sergio Salinas,

Plaintiffs,[6] and Congressman Henry Cuellar.

Plaintiffs assert statutory claims under § 2 of the Voting Rights Act ("VRA") and constitutional claims under the Fourteenth and Fifteenth Amendments to the United States Constitution.

Procedural History and Background

Plaintiffs initially filed several lawsuits in 2011 challenging Plan C185 and Plan H283 enacted by the 82nd Legislature, and the various cases were consolidated. At the time, Texas was subject to preclearance requirements under § 5 of the VRA, and Texas filed a simultaneous action seeking preclearance in the United States District Court for the District of Columbia—*Texas v. United States*, No. 11-1303 (D.D.C).[7] Plaintiffs presented numerous claims in this Court under § 2 of the VRA and the Fourteenth and Fifteenth Amendments, and raised numerous challenges to the plans in the related preclearance litigation in the District of Columbia. The D.C. Court held a trial in January 2012 but had not yet issued a ruling in February 2012.

Carmen Rodriguez, Nancy Hall, Dorothy DeBose, Jessica Farrar, Wanda F. Roberts, Richard Nguyen Le, and TJ Carson.

[6] Margarita V. Quesada, Romeo Munoz, Marc Veasey, Jane Hamilton, Lyman King, John Jenkins, Kathleen Maria Shaw, Debbie Allen, Jamaal R. Smith, and Sandra Puente.

[7] Texas could have sought administrative preclearance by the Attorney General, but instead sought a declaratory judgment from the D.C. District Court. In *Texas v. United States*, Texas bore the burden of proving that its enacted plans had neither the effect nor the purpose of abridging minority voting rights. 887 F. Supp. 2d 133, 139 (D.D.C. 2012) (citing 42 U.S.C. § 1973c(a)).

Faced with impending election deadlines and unprecleared plans that could not be used in the election, this Court was faced with the "unwelcome obligation" of implementing interim plans so that the primaries could proceed. *See* docket no. 690 at 2 (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)). This Court considered compromise plans (Plan C226 and Plan H303) proposed by certain parties. Although the plans were supported by some parties, including Defendants, most parties contended that they maintained statutory and constitutional infirmities challenged in Plan C185 and Plan H283. The Court adopted Plan C235 (which was Plan C226 as modified for purely technical reasons) and Plan H309, a plan similar to Plan H303 but with changes in Harris County, Bexar County, Webb County, and Nueces County.

This Court found that adoption of these plans as the interim plans for the 2012 elections was consistent with the deferential standards set forth in *Perry v. Perez*, 565 U.S. 388 (2012) and would significantly benefit the voters, candidates, election administrators, counties, and political parties. Docket nos. 690, 691. The Court noted that its analysis had been expedited and curtailed and that it had been able to make only preliminary conclusions that might be revised upon full analysis. Docket no. 690 at 3 ("[W]e emphasize the preliminary nature of this order and that, except for the fact that PLAN H309 sets the districts for the 2012 elections, nothing in this opinion reflects this Court's final determination of any legal or factual matters in this case or the case pending in the D.C. Court."); docket no. 691 at 1 (noting that "this interim map is a

result of preliminary determinations" and "is not a final ruling on the merits of any claims").

As directed by the Supreme Court, this Court in adopting an interim map attempted to determine which claims pending in the D.C. Court preclearance litigation were "not insubstantial" because the D.C. Court had exclusive jurisdiction over the § 5 claims but had not yet ruled. That Court issued its decision denying preclearance of Plan C185 and Plan H283 on August 28, 2012. *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012). The panel majority found that Plan C185 increased the "representation gap" from three districts to four districts[8] and thus increased the degree of discrimination and was retrogressive. Because the panel did not agree on the appropriate rationale for finding retrogression, they considered the issue of discriminatory intent and unanimously found that "the plan was enacted with discriminatory purpose." *Id.* at 159. The Court specifically noted that unnecessary changes were made to the three African-American ability districts that raised serious concerns about what motivated the Congressional plan, and that Texas failed to explain the changes as anything other than "coincidence." *Id.* at 159-61.

With regard to Plan H283, the D.C. Court found that it would have the effect of abridging minority voting rights in benchmark ability districts 33, 35, 117, and 149, and that Texas did not create any new ability districts to

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[8] Minority representation fell from 10/32 ability districts (when proportionality would be 13/32) to 10/36 ability districts (when proportionality would be 14/36), thus increasing the representation gap from three districts to four.

offset those losses. Accordingly, the plan was retrogressive and could not be precleared.

Having found retrogressive effect, the D.C. Court did not need to reach whether Plan H283 was drawn with a discriminatory purpose, but it did "note record evidence that cause[d] concern." 887 F. Supp. 2d at 177. This evidence included that the process for drawing the plan "showed little attention to, training on, or concern for the VRA" and the failure to create any new minority ability districts among 150 relatively small House districts despite the dramatic Hispanic population growth concentrated primarily in three geographic areas. *Id.* at 177-78. The D.C. Court further stated, "These concerns are exacerbated by the evidence we received about the process that led to enacted HD 117," specifically that "mapdrawers modified HD 117 so that it would elect the Anglo-preferred candidate yet would look like a Hispanic ability district on paper," showing "a deliberate, race-conscious method to manipulate not simply the Democratic vote but, more specifically, the *Hispanic* vote." *Id.* at 178 (emphasis in original).

The D.C. Court also found incredible the testimony of primary House mapdrawer Gerardo Interiano that he was unaware of the capability of Texas's redistricting software (RedAppl) to display racial data at the census block level, which reinforced evidence suggesting that mapdrawers split voter tabulation districts ("VTDs") along racial lines to dilute minority voting power. *Id.* The D.C. Court concluded,

> This and other record evidence may support a finding of discriminatory purpose in enacting the State House Plan. Although we need not reach this

> issue, at minimum, the full record strongly suggests that the retrogressive effect we have found may not have been accidental.

Id. Texas appealed the D.C. Court's decision denying preclearance to the Supreme Court.

The Court's interim maps, H309 and C235, were used for elections in 2012. Despite urging from the Texas Attorney General to adopt the Court's interim maps during the regular session in 2013,[9] the Texas Legislature's regular session ended in May 2013 with no redistricting action. However, Governor Rick Perry called a special session directing the Legislature to consider "legislation which ratifies and adopts the interim redistricting plans ordered by the federal district court as the permanent plans for districts used to elect members of the Texas House of Representatives, Texas Senate and United States House of Representatives." D-684.

The Legislature reconvened and undertook this redistricting task. During the special session, some changes were made to Plan H309, and it was adopted as Plan H358. By June 23, 2013, the Legislature had passed SB3 and SB4 to enrollment. SB4 "ratified and adopted" this Court's interim congressional map, Plan C235, without change, and repealed SB4 from the 2011 first special session, which had adopted Plan C185. SB3 adopted Plan H358 as the plan for the Texas House of Representatives and repealed HB150 from the 2011

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[9] *See* Quesada-57 (Attorney General Greg Abbott letter to Speaker Straus urging the Legislature to adopt the interim maps during the session).

regular session, which had adopted Plan H283. SB3 and SB4 were sent to the Governor on June 24, 2013.

On June 25, 2013, while Texas's appeal of the D.C. Court's decision was pending, the United States Supreme Court issued its decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), holding that the § 4(b) coverage formula of the VRA that determined which jurisdictions were subject to § 5 preclearance was unconstitutional. Accordingly, Texas was no longer automatically subject to preclearance requirements. The Governor signed SB3 and SB4 on June 26, 2013.[10]

On June 27, 2013, the Supreme Court vacated the D.C. Court's judgment and remanded for further consideration in light of its intervening decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) and the suggestion of mootness filed by defendant Wendy Davis. *Texas v. United States*, 133 S. Ct. 2885 (June 27, 2013). On remand, the D.C. Court dismissed the preclearance litigation as moot.[11]

On June 28, 2013, Defendants filed a motion to dismiss for lack of subject matter jurisdiction (docket no. 768) in this case, arguing that the case had become moot and should be dismissed. This Court held a status conference

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[10] The 2013 plans for the Texas House and U.S. House became law on September 24, 2013. *See* TEX. CONST. ART. III § 39.

[11] Although the Supreme Court did not rule on § 5 itself, the effect of its ruling was to release Texas from the preclearance requirement and render the D.C. preclearance proceedings moot. On remand, Texas moved to dismiss the case as moot, and the United States did not oppose the motion. Some defendants in the case sought leave to amend to assert counterclaims for relief under § 3(c) of the VRA. On December 3, 2013, the D.C. Court granted Texas's motion to dismiss proceedings in that court and denied the motions to amend.

on July 1, at which Plaintiffs expressed a desire to amend their complaints to challenge the 2013 plans, and some Plaintiffs stated their intent to amend their existing claims related to the 2011 plans to seek relief under § 3(c) of the VRA.[12] After the hearing, the Court issued an order summarily denying the motion to dismiss for lack of jurisdiction without prejudice (docket no. 771) and issued an order directing Plaintiffs to file motions for leave to amend pleadings.

Plaintiffs filed their motions, and the State responded in opposition and with a motion to dismiss as moot all claims related to the 2011 plans. This Court entered an order on September 6, 2013 on the pending motions (docket no. 886) permitting Plaintiffs to amend their claims with regard to the 2011 plans to assert requests for equitable relief under § 3(c) and to assert claims against the 2013 plans. The Court rejected Defendants' mootness argument, for the reasons explained in that Order and in docket no. 1104. In sum, this Court found that the claims against the 2011 plans C185 and H283 were not moot because Plaintiffs alleged that they were continuing to be harmed by the Legislature's actions in enacting Plan C185

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[12] Section 3(c), known as the VRA's "bail-in" provision, states, "If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period [may impose preclearance requirements]." 52 U.S.C. § 10302(c) (formerly 42 U.S.C. § 1973a(c)).

and Plan H283, Texas had refused to concede any of Plaintiffs' claims, and Plaintiffs had alleged claims for which meaningful relief was available. The Court further ordered that the 2013 enacted plans, C235 and H358, be used for the 2014 elections.

Thereafter, Plaintiffs filed their amended complaints. Plaintiffs generally maintained their claims against Plan C185 and Plan H283 and sought relief under § 3(c) of the VRA. Most Plaintiffs amended their Complaints to assert claims against Plan C235. Specifically, Congressman Cuellar filed a Second Amended Complaint in Intervention (docket no. 893) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; LULAC filed a Third Amended Complaint (docket no. 894) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the Rodriguez Plaintiffs filed a Second Amended Complaint (docket no. 896) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the Quesada Plaintiffs filed a Third Amended Complaint (docket no. 899) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the NAACP filed a Third Amended Complaint (docket no. 900) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the African-American Congressperson Intervenors filed a Second Amended Complaint (docket no. 901) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the Perez Plaintiffs filed a Sixth Amended Complaint (docket no. 960) asserting intentional discrimination claims under § 2 of the VRA and the Constitution; and

MALC filed a Third Amended Complaint (docket no. 897) asserting claims under § 2 of the VRA.

Some Plaintiffs also amended their complaints to assert claims against Plan H358: the Task Force filed a Fourth Amended Complaint asserting statutory and constitutional claims based on changes to HD90 from the Court's interim plan (docket no. 891); MALC asserted claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments (docket no. 897); the NAACP asserted claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments (docket no. 900); and the Perez Plaintiffs filed a Sixth Amended Complaint (docket no. 960) asserting intentional discrimination claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments, and those claims were joined by LULAC.

The Texas Latino Redistricting Task Force and the United States did not assert claims against Plan C235, and the Task Force claims are limited to HD90 in Plan H358. The Texas Democratic Party ("TDP") and Gilberto Hinojosa filed a First Amended Cross-claim (docket no. 902) to assert partisan gerrymandering claims under the Equal Protection Clause and the First Amendment against the 2013 plans. Individual Plaintiff John Morris also asserted partisan gerrymandering claims against Plan C235 (docket no. 784). This Court granted Defendants' motion to dismiss the political gerrymandering claims against the 2011 and 2013 plans in docket no. 886 and docket no. 1104, and thus all of TDP's and Morris's claims were dismissed. The Court also granted summary judgment on the Fifteenth Amendment claims against the 2011 and 2013 plans in docket no. 275 and docket no. 1108. *See* docket no. 1387.

This Court held a trial on Plan H283 in July 2014 and on Plan C185 in August 2014 and later issued extensive fact findings and rulings on Plaintiffs' claims. The Court found that certain aspects of those plans violated § 2 of the VRA and the Fourteenth Amendment. Docket no. 1365 (Order on Plan H283); docket no. 1364 (Fact Findings related to Plan H283); docket no. 1390 (Amended Order on Plan C185); docket no. 1340 (Fact Findings).[13]

Plaintiffs contend that certain aspects of Plan C185 and Plan H283 that the Court found to be the product of discriminatory intent or constitutional and statutory violations were maintained in Plan C235 and Plan H358, rendering them infirm. In addition, Plaintiffs bring various statutory and constitutional challenges against Plan C235 and Plan H358. This Court held a trial on Plan C235 and Plan H358 in July 2017 and now issues rulings on Plaintiffs' claims against Plan C235.

I. Legal Standards

At this stage, this case involves claims under § 2 of the VRA and the Fourteenth Amendment. The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969). Under § 2, Plaintiffs assert both "results" vote dilution and intentional discrimination/vote dilution claims. Under the

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[13] Judge Garcia and Judge Rodriguez adopt the prior fact findings and opinions and incorporate them into this Order because they are relevant to the 2013 plan claims. In this Order, Judge Smith agrees that the Court's orders on the 2011 plans are law of the case. The findings and conclusions in this order are therefore not inconsistent with what this district court panel has already decided.

Fourteenth Amendment, Plaintiffs assert both intentional discrimination/vote dilution and *Shaw*-type racial gerrymandering claims. The Court discussed these claims previously in its decisions on the 2011 plans, and will briefly summarize the applicable standards here.

A. § 2 of the Voting Rights Act

Section 2 of the VRA "was designed as a means of eradicating voting practices that minimize or cancel out the voting strength and political effectiveness of minority groups." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479 (1997) (internal quotations omitted). In its current form, § 2(a) provides that no voting standard, practice, or procedure "shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . as provided in subsection (b)." 52 U.S.C. § 10301(a). Under section 2(b), a state violates § 2 "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State . . . are not equally open to participation by members of a class of citizens protected by [§ 2(a) of the VRA] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). Section 2 prohibits all race discrimination in voting,[14] but claims under § 2 generally assert vote denial or vote dilution injuries.

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[14] *Thornburg v. Gingles*, 478 U.S. 30, 45 n.10 (1986).

The Supreme Court held in *Mobile v. Bolden*, 446 U.S. 55 (1980),that a race-based vote dilution claim under the Fourteenth Amendment required racially discriminatory intent, not simply dilutive results.[15] In passing the 1982 amendments to the VRA, Congress reacted to that decision. *Velasquez v. City of Abilene, Tex.*, 725 F.2d 1017, 1021 (5th Cir. 1984). As the Fifth Circuit noted in *LULAC v. Clements*, 999 F.2d 831, 849-51 (5th Cir. 1993), "the 1982 Amendments [to § 2] 'codify' the 'results test' articulated in" constitutional voting discrimination cases prior to *Mobile v. Bolden*, making clear that a § 2 violation could be proved without discriminatory intent.[16] However, the Legislative history of § 2 and case law also make clear that voters may bring a claim based on discriminatory voting practices using either the results test or an intentional discrimination test.[17] The Senate Report further states

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[15] *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997) ("Since 1980, a plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment, has been required to establish that the State or political subdivision acted with a discriminatory purpose.").

[16] The Supreme Court noted in *Gingles* that the Senate Report states that amended § 2 was designed to restore the "results test"—the legal standard that governed voting discrimination cases prior to *Mobile v. Bolden* and that in pre-*Bolden* cases such as *White v. Regester* plaintiffs could prevail by showing that, under the totality of circumstances, a challenged election law or procedure had the effect of denying a protected minority an equal chance to participate in the electoral process. *Gingles*, 478 U.S. at 44 n.8; *see also Jones v. City of Lubbock*, 727 F.2d 364, 379 (5th Cir. 1984) (the amended § 2 codifies pre-*Bolden* vote dilution law).

[17] S. REP. NO. 97-417 ("The Amendment to the language of section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the

that, if a § 2 plaintiff chooses to prove discriminatory intent, "direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions" would be relevant evidence of intent. *McMillan*, 748 F.2d at 1046-47 (quoting S. REP. NO. 97-417 at 27 n.108).

1. Results Claims

As noted, Congress amended § 2 of the VRA in 1982 "to prohibit legislation that *results* in the dilution of a minority group's voting strength, regardless of the legislature's intent." *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (emphasis in original). Such results claims are governed by the framework established in *Thornburg v. Gingles*, 478 U.S. 30 (1986). *Gingles* identified three threshold conditions for establishing a § 2 results violation: (1) the racial group is sufficiently large and geographically compact to constitute a majority in a

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challenged system of practice in order to establish a violation. Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.") (footnote omitted); *United States v. Brown*, 561 F.3d 420, 432 (5th Cir. 2009) ("To violate the statute, however, these practices must be undertaken with an intent to discriminate or must produce discriminatory results."); *Garza v. Cty. of Los Angeles*, 918 F.2d 763, 766 (9th Cir. 1990) ("[A]fter the 1982 amendment, the Voting Rights Act can be violated by both intentional discrimination in the drawing of district lines and facially neutral apportionment schemes that have the effect of diluting minority votes."); *McMillan v. Escambia Cty., Fla.*, 748 F.2d 1037, 1046 (5th Cir. 1984) ("Congress intended that fulfilling *either* the more restrictive intent test or the results test would be sufficient to show a violation of section 2.")(emphasis in original).

single-member district; (2) the racial group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Johnson v. De Grandy*, 512 U.S. 997, 1006-07 (1994); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017).

"When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994). A minority population (either singly or combined in coalition with other minorities[18]) is sufficiently large when it constitutes greater than 50% of the citizen voting age population of the district. *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009) (plurality); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853 (5th Cir. 1999). Because the decennial census data does not include CVAP data, the Court has instructed the parties to use the five-year 2011-2015 ACS survey data to best approximate the CVAP in 2013, when the maps were enacted.[19]

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[18] As discussed at length in the Court's opinion on plan H283 (and not repeated here), the Court finds that § 2 can require the creation of coalition districts.

[19] Because the § 2 results test is concerned only with whether the districting scheme *results* in vote dilution, and not the Legislature's knowledge or intent, *Shaw*, 509 U.S. at 641, the Court has concluded that evidence that best reflects the population at the time of redistricting should be considered to determine whether vote dilution resulted from the districting plans, regardless of whether the

Generally, to evaluate § 2 results claims, it must be determined how many "reasonably compact districts" exist in the enacted plan, and whether Plaintiffs have demonstrated that more were required, which is usually done through presentation of demonstration maps. *LULAC v. Perry*, 548 U.S. 399, 430 (2006) ("*De Grandy* requires a comparison between a challenger's proposal and the 'existing number of reasonably compact districts.'"). When evaluating compactness, the Court focuses on the compactness of the minority population (in terms of its size and concentration), not the compactness of the contested district or necessarily the precise shape of its boundaries, though the shape of the district is relevant insofar as it provides evidence concerning the compactness of the minority population. *LULAC v. Perry*, 548 U.S. 399, 433 (2006); *Houston v. Lafayette Cty., Miss.*, 56 F.3d 606, 611 (5th Cir. 1995).[20]

If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district, and a district that reaches out to grab small and apparently isolated minority communities is not reasonably compact. *Bush v. Vera*, 517 U.S. 952, 979 (1996); *LULAC*, 548 U.S. at 432. However, members of a

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evidence or data was available to the Legislature at the time of redistricting.

[20] In its most recent decision, the Supreme Court phrased the requirement as being that the minority population must be sufficiently large and geographically compact to constitute a majority "in some reasonably configured legislative district." *Harris*, 137 S. Ct. at 1470.

racial group in different areas could share similar interests and therefore form a compact district "if the areas are in reasonably close proximity." *LULAC*, 548 U.S. at 435. "A district would not be sufficiently compact if it was so convoluted that there was no sense of community, that is, if its members and its representative could not easily tell who actually lived in the district." *Rodriguez v. Harris Cty., Tex.*, 964 F. Supp. 2d 686, 737-38 (S.D. Tex. 2013) (citing *Clark v. Calhoun Cty., Miss.*, 21 F.3d 92, 96 (5th Cir. 1994) (noting that "[a] number of courts have concluded that the first *Gingles* precondition is not satisfied if the proposed district does not retain a natural sense of community such that it can be effectively represented")).

Further, the § 2 compactness inquiry must take into account traditional districting principles such as maintaining communities of interest and traditional boundaries. *Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (citing *Bush v. Vera*, 517 U.S. 952, 977 (1996)); *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1391-92 (E.D. Wa. 2014) ("The compactness inquiry under § 2 . . . focuses more generally on whether the proposed minority district reasonably comports with 'traditional districting principles' such as contiguousness, population equality, maintaining communities of interest, respecting traditional boundaries, and providing protection to incumbents."). "The recognition of nonracial communities of interest reflects the principle that a State may not assume from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls." *LULAC*, 548 U.S. at 433 (internal quotations and alterations omitted).

Thus, to evaluate compactness, the Court considers the dispersion of the relevant minority population, the shape of the proposed district (as measured by a visual evaluation and by statistical measures of compactness) and the causes underlying its shape, and the district's compliance with traditional redistricting principles (such as respect for communities of interest and traditional boundaries). *See Rodriguez*, 964 F. Supp. 2d at 737-54; *see also Vera v. Richards*, 861 F. Supp. 1304, 1341 (S.D. Tex. 1994) (noting that a district's compactness must be a relative measure based on location and population density and that "[i]n a major urban county, compactness makes little sense if considered in terms of geographic sprawl alone, but it seems far more probative when viewed in terms of a city's or county's neighborhoods, geopolitical subdivisions, and business location"), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996).[21]

The second and third *Gingles* preconditions are referred to collectively as "racially polarized voting." Defendants conceded the existence of racially polarized voting across Texas, except in Nueces and Kleberg Counties, in terms of the fact that minority voters and Anglo voters tend to vote differently. The fact that minority voters and Anglo voters tend to support

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[21] If the proposed demonstration district is bizarrely shaped because the minority population within it is not reasonably compact, then § 2 generally will not require the district. However, § 2 does not require compact districts, and bizarre shape may be the result of non-racial factors such as geographical constraints and respecting precinct and city boundaries. Thus, the shape of the district is relevant, but the Court must examine the reasons for the district's shape.

different candidates in Texas is essentially undisputed and is supported by all the expert testimony in the case, regardless of the methodology used (except with regard to Travis County).[22] However, Defendants dispute whether such racially polarized voting is legally significant in terms of the degree of minority cohesion and Anglo crossover voting, and in terms of whether such racially polarized voting is the result of race as opposed to politics.[23]

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[22] Racial bloc voting and minority-group political cohesion never can be assumed, but must be proved in each case in order to establish that a redistricting plan dilutes minority voting strength in violation of § 2. *Shaw v. Reno*, 509 U.S. 630, 653 (1993) (citing *Growe v. Emison*, 507 U.S. 25, 40-41 (1993)). However, there is ample evidence in the record to support Defendants' concession, at least concerning Latino voter cohesion, African-American voter cohesion, and Anglo bloc voting. Defendants do not concede that minority voters are cohesive

[23] In this regard, Defendants rely on the Fifth Circuit's decision in *LULAC v. Clements*, 999 F.2d 23 831, 850 (5th Cir. 1993) (en banc), in which the court accepted the argument that "[w]hen the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens," vote dilution is not "on account of race or color" as required by the VRA. The court noted that the question was "not whether white residents tend to vote as a bloc, but whether such bloc voting is 'legally significant.'" *Id.* The district court held that plaintiffs "need only demonstrate that whites and blacks generally support different candidates to establish legally significant white bloc voting." *Id.* Defendants argued that the district court erred in refusing to consider the nonracial causes of voting preferences they offered. The Fifth Circuit agreed, holding that "[i]n holding that the failure of minority-preferred candidates to receive support from a majority of whites on a regular basis, without more, sufficed to prove legally significant racial bloc voting, the district court loosed § 2 from its racial tether and fused illegal vote dilution and political defeat," in

If all three *Gingles* preconditions are satisfied, § 2 requires consideration of the "totality of circumstances" to determine whether members of a racial group have less opportunity than do other members of the electorate. *LULAC v. Perry*, 548 U.S. 399, 425-26 (2006). The Supreme Court has referred to the Senate Report on the 1982 amendments to the VRA, which identifies factors typically relevant to a § 2 claim, including:

> the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group . . .; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 426 (quoting S. REP. NO. 97-417 at 117,206). The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized

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violation of *Whitcomb v. Chavis*, 403 U.S. 124 (1971) and the consensus of a majority of justices in concurring opinions in *Thornburg v. Gingles*, 478 U.S. 30 (1986) (specifically Justices Powell, Rehnquist, O'Connor, Burger, and White). *Clements*, 999 F.2d at 850-51.

needs of the members of the minority group, and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous, may have probative value. *LULAC*, 548 U.S. at 426.

Last, although § 2 does not guarantee proportional representation, proportionality—whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area—is always a relevant consideration. *LULAC*, 548 U.S. at 426; *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994).

2. § 2 Intentional Discrimination/Intentional Vote Dilution

As discussed in this Court's opinion on Plan C185, the Supreme Court has declined to decide whether the *Gingles* preconditions apply to intentional vote dilution/discrimination claims under § 2. Docket no. 1390 at 116 ("[T]he Supreme Court expressly stated in *Bartlett v. Strickland*, 556 U.S. 1, 20 (2009), that it did not consider 'whether intentional discrimination affects the *Gingles* analysis' and that its holding (setting forth the majority-minority requirement to satisfy the first *Gingles* factor for a § 2 results claim) 'does not apply to cases in which there is intentional discrimination against a racial minority.'"). This Court previously concluded that Plaintiffs are not required to satisfy the first *Gingles* precondition to prove discriminatory racial gerrymandering and intentional vote dilution, but that the other § 2 factors, including the existence of racially polarized voting and the totality of circumstances, remain

relevant to such claims. Docket no. 1390 at 118. The ultimate § 2 inquiry remains whether minority voters have less opportunity to participate in the political processes and to elect candidates of their choice. *See Rogers v. Lodge*, 458 U.S. 613, 624 (1982).

Further, the rubric for analyzing discriminatory purpose under § 2 is the same as under the Equal Protection Clause of the Constitution. Discriminatory intent is shown when racial discrimination was a motivating factor in the governing body's decision to adopt or maintain a voting practice or procedure. *Brown*, 561 F.3d at 433 ("Under the intent-based approach, '[r]acial discrimination need only be one purpose, and not even a primary purpose, of an official act' for a violation [of § 2] to occur.")[24]; *Garza*, 918 F.2d at 766 ("To the extent that a redistricting plan deliberately minimizes minority political power, it may violate both the Voting Rights Act and the Equal Protection Clause of the fourteenth amendment.").

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[24] In *United States v. Brown*, the Fifth Circuit noted that the Senate factors supply a source of circumstantial evidence regarding discriminatory intent, as do the factors set forth in *Arlington Heights*. 561 F.3d at 433. As this Court previously concluded, these factors are a relevant source of evidence to be considered as part of the totality of circumstances. However, discriminatory results remain insufficient by themselves to establish discriminatory intent. *Mobile*, 446 U.S. at 71 n.17 ("Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite or,' its adverse effects upon an identifiable group.") (quoting *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

B. Fourteenth Amendment claims

Plaintiffs bring two types of claims under the Equal Protection Clause of the Fourteenth Amendment, the central purpose of which "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993). The first claim is a racial discrimination claim, which requires racially discriminatory intent and discriminatory effect. The second claim is a *Shaw*-type racial gerrymandering claim, the essence of which is that mapdrawers have separated voters into districts on the basis of race, and which does not require racially discriminatory intent.[25]

1. Intentional Racial Discrimination/Intentional Vote Dilution

Legislative apportionment schemes may violate the Fourteenth Amendment if "conceived or operated as purposeful devices to further racial discrimination by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population." *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (internal quotations omitted) (affirming district court's finding that at-large voting scheme, although racially neutral when adopted, was being maintained for the invidious purpose of diluting

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[25] *Miller v. Johnson*, 515 U.S. 900, 910 (1995) (noting that a *Shaw*-type claim is "analytically distinct" from a vote dilution claim because a vote dilution claim "alleges that the State has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting potential of racial or ethnic minorities,' an action disadvantaging voters of a particular race[, while] the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts" regardless of motive) (internal citations omitted).

the voting strength of the black population).[26] A showing of racially motivated discrimination is a necessary element for a successful claim of unconstitutional vote dilution under the Fourteenth Amendment. *Reno v. Bossier Barish Sch. Bd.*, 520 U.S. 471, 481 (1997) (citing *Mobile v. Bolden*, 446 U.S. 55, 66 (1980)).

Discriminatory intent need not be proved by direct evidence. *Rogers*, 458 U.S. at 618. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Id.* (quoting *Arlington Heights*, 429 U.S. at 265)[27]. Determining the existence of a discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.*

Courts should look to the Supreme Court's decision in *Arlington Heights* for guidance in analyzing whether invidious discriminatory purpose was a motivating factor in a government body's decisionmaking. *Bossier Parish*, 520 U.S. at 488. The important starting point for assessing discriminatory intent is "the impact of the official action whether it 'bears more heavily on one race than another.'"

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[26] *See also Shaw v. Reno*, 509 U.S. 630, 641 (1993) (electoral schemes "violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength"); *Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (legislative apportionment scheme is unconstitutional if its purpose was "invidiously to minimize or cancel out the voting potential of racial or ethnic minorities").

[27] As noted, disproportionate effects alone are insufficient to establish a claim of unconstitutional vote dilution.

Id. at 489. Other relevant considerations include: the historical background of the jurisdiction's decision, the specific sequence of events leading up to the challenged decision, departures from the normal procedural sequence, and the legislative history, especially any contemporary statements by members of the decisionmaking body. *Id.*; *Arlington Heights*, 429 U.S. at 268.

2. "*Shaw*-type" Racial Gerrymandering Claim

Although a "legislature always is *aware* of race when it draws district lines," *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (emphasis in original), it may not use race as the predominant factor in drawing district lines unless it has a compelling reason. *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017). A *Shaw*-type racial gerrymandering claim[28] is "that race was improperly used in the drawing of the boundaries of one or more specific electoral districts." *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (emphasis omitted). In such a claim, the plaintiff's evidentiary burden is "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motiving the legislature's decision to place a significant number of voters within or without a particular district." *Id.* at 1267.[29] The Court's decision in *Bethune-Hill v. Virginia*

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[28] The Court refers to these claims as *Shaw*-type claims because the Supreme Court first recognized the viability of such a claim under the Equal Protection Clause in *Shaw v. Reno*, 509 U.S. 630 (1993).

[29] Laws that classify citizens on the basis of race are constitutionally suspect, regardless of whether the reason for the

State Bd. of Elections, 137 S. Ct. at 799, additionally made clear that "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering" and that courts should evaluate the predominant motive for the design of the district as a whole.

If race predominates, strict scrutiny applies. To survive strict scrutiny, the challenged districting plan must be narrowly tailored to serve a compelling governmental interest. *Bush v. Vera*, 517 U.S. 952, 959, 976 (1996). For a racial classification to serve a compelling interest, the Legislature must have a strong basis in evidence to support that interest before it implements the classification. *Shaw v. Hunt*, 517 U.S. 899, 910 (1996). Further, the means chosen to accomplish the State's asserted purpose must be specifically and narrowly

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classification is benign or the purpose remedial. *Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996); *see also id.* at 907 ("Racial classifications are antithetical to the Fourteenth Amendment . . . ."). The essence of a *Shaw*-type equal protection claim is that the State has used race as a basis for separating voters into districts. *Miller*, 515 U.S. at 911. Such use of race "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." *Shaw v. Reno*, 509 U.S. 630, 650 (1993). Further, such use of race reinforces the belief "that individuals should be judged by the color of their skin" and "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions" and "threatens to carry us further from the goal of a political system in which race no longer matters." *Id.* at 657.

tailored to accomplish that purpose. *Id.* at 908. To be narrowly tailored, the legislative action must substantially address, if not achieve, the avowed purpose. *Id.* at 915.

This Court previously concluded that compliance with § 2 of the VRA constitutes a compelling governmental interest. Docket no. 1390 at 42 (citing *Bush*, 517 U.S. at 994 (O'Connor, J., concurring); *Clark v. Calhoun Cty., Miss.*, 88 F.3d 1393, 1405-06 (5th Cir. 1996)). When a State invokes the VRA to justify race-based districting, it "must have a strong basis in evidence for concluding that the three *Gingles* preconditions exist in order to claim that its redistricting plan is reasonably necessary to comply with § 2." *Clark*, 88 F.3d at 1405-06; *see also Shaw*, 517 U.S. at 915; *Bush*, 517 U.S. at 978 ("The State must have a 'strong basis in evidence' for finding that the threshold conditions for § 2 liability [i.e., the *Gingles* preconditions] are present."); *Harris*, 137 S. Ct. at 1471.[30] "If a State has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. But if not, then not." *Harris*, 137 S. Ct. at 1470 (citation omitted).

The legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored. *Shaw v. Hunt*, 517 U.S. at 915. "If a § 2 violation is proved for a particular area, it flows from the fact that individuals in this area 'have less opportunity than other members of the electorate to participate in the political

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[30] "[The] 'strong basis' (or 'good reasons') standard gives States 'breathing room' to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Harris*, 137 S. Ct. at 1464.

process and to elect representatives of their choice.'" *Id.* at 917 (quoting 42 U.S.C. § 1973(b)). The State may "use one majority-minority district to compensate for the absence of another only when the racial group in each area had a § 2 right and both could not be accommodated." *LULAC v. Perry*, 548 U.S. 399, 429 (2006).

Compliance with § 5 of the VRA was also a compelling state interest at the time these plans were enacted. However, "a reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw v. Reno*, 509 U.S. 630, 655 (1993); *see also Alabama LBC*, 135 S. Ct. at 1274 (noting that the proper question for § 5 nonretrogression is, "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?").

II. Claims based on legislative intent

This case is unusually complex given the Legislature's enactment in 2013 of the Court's interim plans. As noted, the 2013 enactment raised questions of mootness in the 2011 plan phase, and now raises difficult questions concerning the proper resolution of Plaintiffs' *Shaw*-type and intentional vote dilution claims in the 2013 plan case.

Although Plaintiffs' claims focus on specific areas where they have suffered harm, as they must given that racial discrimination and vote dilution claims belong to individuals and not the minority group as a whole,[31] the

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[31] *See LULAC v. Perry*, 548 U.S. 399, 437 (2006) ("A local appraisal is necessary because the right to an undiluted vote does not belong to the 'minority as a group,' but rather to 'its individual

redistricting plans are statewide plans, and Plaintiffs contend that the statewide plans were adopted with discriminatory intent. In addition, with regard to specific areas in which this Court found *Shaw*-type violations and intentional discrimination, Plaintiffs contend that such violations remain in the 2013 plans. Defendants contend that the 2013 Legislature could have no discriminatory intent because it simply relied on this Court's judgment that the plans contained no legal infirmities, despite the interim nature of the plans and the Court's warnings that its decisions were necessarily hasty and not based upon a full review of the facts or the law. Defendants assert that the 2013 Legislature's lack of intent to discriminate in 2013 and the fact that it did not actually draw any districts subject to *Shaw*-type challenges in the interim plans in 2013 mean that all such claims must fail for lack of the necessary intent.[32]

Defendants' position incorrectly assumes that the intent inquiry must be limited to the drawing of district lines in 2013. The Fifth Circuit has rejected such a

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members.'"); *Alabama LBC v. Alabama*, 135 S. Ct. 1257, 1265-66 (2015) (noting that the harms that underlie a racial gerrymandering claim are personal, including being personally subjected to a racial classification and being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group, though noting that voters could make the claim that every individual district in a state suffers from racial gerrymandering).

[32] Defendants refer specifically to district lines that remain unchanged from the interim plans; the Task Force Plaintiffs have raised a new *Shaw* claim against changes made to HD90 in Plan H358 during the 2013 special session. This discussion does not involve that claim.

position: "[C]ases of this circuit emphasize that the search for improper motivation does not end at the enacting stage." *Nevett v. Sides*, 571 F.2d 209, 221 (5th Cir. 1978). Rather, the Fifth Circuit has proposed three means by which a plaintiff could meet the purpose standard: A plaintiff could demonstrate either through direct or circumstantial evidence that the government body *adopted* the electoral scheme with a discriminatory purpose, that the government body *maintained* the scheme with discriminatory purpose,[33] or that the system *furthered* pre-existing intentional discrimination.[34] *Jones*

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[33] *McMillan v. Escambia Cty., Fla.*, 688 F.2d 960 (1982) (affirming district court's holding that at-large voting scheme was being maintained for a discriminatory purpose), *vacated on other grounds* 466 U.S. 48 (1984) (vacating judgment on constitutional grounds and remanding for consideration of whether § 2 claims would support the judgment); *see also Mobile v. Bolden*, 446 U.S. 55 (1980) (considering whether maintenance of Mobile's at-large system for election of City Commissioners violated the Fourteenth Amendment as purposefully racially discriminatory).

[34] *See Kirksey v. Bd. of Sup'rs of Hinds Cty., Miss.*, 554 F.2d 139, 142 (5th Cir. 1977) ("A redistricting plan is constitutionally impermissible as racially discriminatory if it is a racially motivated gerrymander or if it perpetuates an existent denial of access by the racial minority to the political process."). In *Kirksey*, the court stated:

> Where a plan, though itself racially neutral, carries forward intentional and purposeful discriminatory denial of access that is already in effect, it is not constitutional. Its benign nature cannot insulate the redistricting government entity from the existent taint. If a neutral plan were permitted to have this effect, minorities presently denied access to political life for unconstitutional reasons could be walled off from relief against continuation of that denial. The redistricting body would only need to adopt a racially benign plan that permitted the record of the past to continue

v. City of Lubbock, 727 F.2d 364, 377 (5th Cir. 1984) (discussing *Nevett*, 571 F.2d at 217-21).[35] Thus, under these precedents, although the 2013 Legislature did not draw the challenged districts in Plan C235 and Plan H358

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unabated. Such a rule would sub silentio overrule *White v. Regester*. It would emasculate the efforts of racial minorities to break out of patterns of political discrimination.

Id. at 146-47. The Court acknowledged that the Supreme Court had required discriminatory purpose in *Washington v. Davis* and in *Arlington Heights*, but reasoned that "nothing in these cases suggests that, where purposeful and intentional discrimination already exists, it can be constitutionally perpetuated into the future by neutral official action." *Id.* at 148.

[35] In *Nevett v. Sides*, 571 F.2d 209, 221 (5th Cir. 1978), the Fifth Circuit recognized that a plan, racially neutral at its adoption, may further preexisting intentional discrimination, or it may be maintained for invidious purposes. Whether invidious discrimination motivates the adoption or maintenance of a districting scheme or whether the plan furthers preexisting purposeful discrimination, the intent requirement may be satisfied by direct or circumstantial evidence. *Nevett* was decided before the Supreme Court's decision in *Mobile v. Bolden*, but as the Supreme Court noted in *Rogers v. Lodge*, the Fifth Circuit held in *Nevett* that a showing of racially motivated discrimination is a necessary element in an equal protection vote dilution claim. *Rogers*, 458 U.S. at 621 (quoting *Nevett*, 571 F.2d at 219). In *Jones v. City of Lubbock*, 727 F.2d 364, 377 (1984), the Fifth Circuit stated that *Mobile v. Bolden* "cast doubt on the viability of this court's analysis in *Nevett II*." What it cast doubt on, however, is what proof suffices to establish discriminatory purpose, as the Fifth Circuit had relied on the "objective factors endorsed in *Zimmer*" and post-*Bolden* cases "differed in their evaluation of the extent to which the *Zimmer* analysis survived *Bolden*." *Id.* at 378; *see also Corder v. Kirksey*, 639 F.2d 1191, 1194 (5th Cir. 1981) ("Our failure, however, appears to have turned on the quantum of evidence required for such a finding [of discriminatory intent], rather than upon the substance of the approach itself.").

(other than HD90), Plaintiffs could nevertheless establish their claim by showing that the Legislature adopted the plans with a discriminatory purpose, maintained the district lines with a discriminatory purpose, or intentionally furthered preexisting intentional discrimination.

In addition, the Supreme Court case of *Hunter v. Underwood*, 471 U.S. 222 (1985), refutes Defendants' position. In *Hunter*, the Supreme Court held that a felon disenfranchisement provision adopted with discriminatory intent in 1901 violated the Equal Protection Clause in 1985, regardless of the fact that certain of the more blatantly discriminatory selections had been struck down by the courts, because "its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." *Id.* at 233. With regard to those areas in Plan C185 and Plan H283 where the Court found that district lines were drawn with impermissible motive and those lines remain unchanged in Plan C235 and Plan H358 such that discrimination continues to have its intended effect, *Hunter* indicates that those portions of the plans remain unlawful. In those areas, the district lines were motivated by a desire to discriminate on account of race, and they continue to have that effect; thus, they violate § 2 and the Constitution.

Defendants contend that the Legislature's adoption of the Court's interim plans nevertheless removed any such illegality from the plans; they assert that their enactment of the plans in 2013 with no improper motive removes any discriminatory intent. *Hunter* involved the passage of time and a narrowing of the discriminatory legislation by

the courts; it did not involve a later reenactment of the narrowed disenfranchisement law, which is what Defendants now claim cleanses the plans. Other courts have considered the effect of subsequent legislative enactments on the legislative intent inquiry. The most relevant case, because it comes from the Fifth Circuit and involves redistricting, is *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000).

In *Chen*, the plaintiffs mounted a *Shaw*-type racial gerrymandering claim against the City of Houston's districting, and contended that "the 1997 plan substantially maintained the borders of previous plans, and that those borders were set by a process in which race—specifically, the desire to create two black and two Hispanic single member districts—predominated." *Id.* at 513. The plaintiffs argued "that the City violated *Shaw* by failing to make substantial changes in a districting structure that was originally designed in a manner that race predominated over traditional districting concerns." *Id.* at 518.

The Fifth Circuit rejected the City's assertion and the district court's conclusion that the intent behind the creation of the prior plans was not properly before the court. *Id.* It noted that, in the context of the VRA, "evidence that impermissible racial intent had tainted the plan upon which the challenged plan was based has been allowed, even when enough time has elapsed for a substantial degree of familiarity and political reliance to emerge." *Id.* The Court then considered Plaintiffs' evidence concerning the earlier redistricting process, but found that its quality fell "far short of that introduced in the cases examined by the Supreme Court," and the Court

did not find that race predominated in the drawing of earlier plans (*i.e.*, there was no prior impermissible reliance on race). *Id.* Later in the opinion, the Court stated that,

> while the district court erred in categorically and totally dismissing evidence of intent garnered from prior plans, it was correct to point out that the state of mind involved in the prior plans is not of itself what is precisely and directly the ultimate issue before the Court in this case. We have noted in a different context that while under *Hunter* the discriminatory intent of the original drafter may carry forward despite subsequent judicial invalidation of the most obviously discriminatory provisions, intervening reenactment with meaningful alterations may render the current law valid.

Id. at 521 (citing *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998)).[36] It continued, "We do not suggest that the

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[36] The Court included the following parenthetical to describe *Cotton*: "while [the] disenfranchisement constitutional provision originated in an attempt to discriminate, subsequent reenactment with alterations approved by voters added categories of crimes originally excluded because they were not considered 'Black' crimes and subtracted a less serious offense that had been considered a 'Black' crime." In *Cotton*, the Fifth Circuit noted that *Hunter* "left open the possibility that by amendment, a facially neutral provision . . . might overcome its odious origin." 157 F.3d at 391. Although the disenfranchisement provision at issue was originally enacted in 1890 with discriminatory intent, it was amended in 1950 and 1968 through a deliberative process, which the court held could "supersede" the previous provision and "remove[] the discriminatory taint associated

with the original version" unless the amendments "were adopted out of a desire to discriminate against blacks." *Id.* at 391-92. Because the Court found no such evidence and because the amended statute sought "to penalize all criminals convicted of certain crimes, Hunter [did] not condemn" the law. *Id.* at 392. Thus, the Court based its holding on the lack of new discriminatory intent during re-enactment and the fact that the amended statute no longer targeted "black" crimes.

The Court notes that there is an important distinction between a felon disenfranchisement law and a district that violates *Shaw*. According to *Cotton*, a law disenfranchising convicted felons is unconstitutional only if it has the intent and effect of racial discrimination, making discriminatory purpose the paramount consideration. Discriminatory purpose is not an element of a *Shaw*-type claim. As this Court has discussed, a district drawn in violation of the *Shaw* principles is illegitimate regardless of whether it was drawn with racially discriminatory purpose because its illegality turns on whether race predominated in the decision of which voters to include and exclude in the district, whenever that decision is made, and whether there was a strong basis in evidence for such use of race. The passage of time or the re-enactment of a plan including the identical district does not typically change any facts concerning which voters were placed within or without the district when it was drawn, unlike discriminatory intent, which can change over time. Thus, the original decisions concerning which voters to place in and out of a district should remain the focus for inquiry in a *Shaw* claim, regardless of a later re-enactment of the identical district, unless there is a showing that the legislature specifically considered who should be in the district during the later re-enactment. Similarly, whether the legislature had a strong basis in evidence for the use of race originally should remain the operative inquiry. However, to the extent a subsequent legislature may have a strong basis in evidence for a previous use of racially predominant criteria that did not exist at the time of the initial enactment, that legislative intent would be relevant in determining whether a district that was an unconstitutional gerrymander when drawn remains so.

changes implemented in 1993, 1995, and 1997 to the original framework were as dramatic as those in *Cotton*. However, that case broadly stands for the important point that when a plan is reenacted—as opposed to merely remaining on the books like the provision in *Hunter*—the state of mind of the reenacting body must also be considered." *Id.*

Plaintiffs argue that the taint of discriminatory intent is generally removed from amended legislation only where a fact-specific inquiry reveals that the new statute was enacted significantly later than the discriminatory one,[37] legislators underwent a "deliberative process" prior to amendment or reenactment, and the new statute does not continue the same adverse racially disparate impact. *E.g.*, docket no. 1524 at 9-10. While the Court does not agree that the presence or absence of any of these factors is necessarily dispositive, it agrees that these are relevant considerations for analysis. Based on *Chen/Cotton* and *Hunter*, the Court finds the most important consideration is whether the 2011 plans continue to have discriminatory or illegal effect, and whether the reenactment furthers that existing discrimination: "A state law prohibiting exercise of the vote . . . is unconstitutional if 'its original enactment was motivated by a desire to discriminate

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[37] The 2013 plans were enacted by a substantially similar Legislature with the same leadership only two years after the original enactment. This factor weighs in Plaintiffs' favor. In addition, the *Arlington Heights* factor of the history of discrimination continues to support a finding of discrimination, bolstered by this Court's finding of discriminatory intent by the 2011 Legislature in passing the 2011 plans themselves. Further, there is no indication that the Legislature mitigated its hostility to minority districts.

against blacks on account of race and the section *continues to this day to have that effect.*'" *Cotton*, 157 F.3d at 391 (citing *Hunter*, 471 U.S. at 233) (emphasis added).

In *Chen*, the Fifth Circuit found no *Shaw* violation in the original enactment; thus, there was no issue of a continuing harm. Similarly, in *Cotton*, the Fifth Circuit noted that the amendments to the felon disenfranchisement statute meant that it no longer targeted "black" crimes and that it "now seeks only to penalize all criminals convicted of certain crimes" such that there was no longer any unconstitutional harm flowing from the statute. *Cotton*, 157 F.3d at 392.

Here, in contrast, specific portions of the 2011 plans that this Court has found to be discriminatory or unconstitutional racial gerrymanders continue unchanged in the 2013 plans, their harmful effects "continu[ing] to this day." *Hunter*, 471 U.S. at 233. The fact that this Court made changes to the statewide plans and the Legislature then adopted the Court's plans does not change this fact. Further, the Legislature did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans. No changes were made to the congressional plan, and changes to the House plan were subject to severe constraints, rendering them largely cosmetic. Although this Court did not rule out the possibility that coalition districts could be required or that the County Line Rule would have to yield to the VRA, the Legislature continued its steadfast refusal to consider either possibility. And despite the findings of discriminatory intent by the D.C. Court, there is no indication that the Legislature looked to see whether any discriminatory taint remained in the plans. Instead,

the Legislature pushed the redistricting bills through quickly in a special session.[38] Rep. Martinez Fischer testified that necessary resources were not allocated to support a true deliberative process.[39]

Moreover, the adoption of the interim plans intentionally furthered and continued any discrimination that might be found in the 2011 plans and incorporated into the 2013 plans. The Legislature did not adopt the Court's plans with the intent to adopt legally compliant plans free from discriminatory taint, but as part of a litigation strategy. Defendants had steadfastly maintained that their 2011 plans had no legal infirmities—throughout this litigation in 2011, when sponsoring the compromise plans in 2012 that became the interim plans, and thereafter. Although the D.C. Court found that the 2011 plans violated § 5 of the VRA and cited evidence of discriminatory intent, Defendants did not accept those rulings and instead appealed to the Supreme Court. Yet upon the urging of the Attorney General, who was responsible for the litigation in this court, they decided to adopt the interim maps.

The decision to adopt the interim plans was not a change of heart concerning the validity of any of Plaintiffs' claims[40] in either this litigation or the D.C. Court litigation

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[38] The special session did not have a two-thirds rule in the Senate or a calendar rule in the House.

[39] The HRC did not have counsel when the session started, and later Darby announced his intent to hire counsel only for himself. The attorneys later asked to withdraw and the committee was then directed to the TLC. JX-13.4 at 4-5.

[40] *E.g.*, JX-5 (Bill Analysis of SB 1524 introduced by Sen. Seliger in the regular session) ("Though the Texas Legislature remains

and was not an attempt to adopt plans that fully complied with the VRA and the Constitution—it was a litigation strategy designed to insulate the 2011 or 2013 plans from further challenge, regardless of their legal infirmities.[41] The letter from then-Attorney General Abbott to Speaker Joe Straus makes the strategy clear: Abbott advised that the "best way to avoid further intervention from federal judges in the Texas redistricting plans" and "insulate the State's redistricting plans from further legal challenge" was to adopt the interim maps. Quesada-57; DX-858. Thus, Defendants sought to avoid any liability for the 2011 plans by arguing that they were moot, and sought to ensure that any legal infirmities that remained in the 2013 plans were immune from any intentional discrimination and *Shaw*-type racial gerrymandering claims.

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confident that the legislatively-drawn maps adopted in 2011 are fair and legal and comply with all provisions of federal law, there remain several outstanding legal questions regarding these maps that undermine the stability and predictability of the electoral process in Texas.")

[41] The evidence indicates that not only did the strategy originate in the Attorney General's office, but also the legislative fact findings accompanying the plans, before the Legislature had engaged in any fact findings on the bills. Tr1558 (Darby). The fact findings in the introduced versions of the bills included that the interim plans complied "with all federal and state constitutional provisions or laws applicable to redistricting plans." Later, when Sen. Zaffirini offered an amendment to remove the legislative findings, Seliger objected, asserting that the amendment "guts the bill." JX-24.4 at § I p. 13. The amendment failed. The Senate later agreed to remove the language from the Senate plan, which everyone agreed was lawful, but refused to eliminate it from the House and congressional plan bills. Tr1558 (Darby).

Defendants knew that most Plaintiffs would maintain claims against the interim plans if adopted, despite the changes, and that such challenges might indicate that further changes to the maps were required. With regard to the interim plans, Abbott's letter does not say that the plans cure legal infirmities in the plan, only that they "have the approval from the federal judges overseeing this litigation." *Id.* Although this Court had "approved" the maps for use as interim maps, given the severe time constraints it was operating under at the time of their adoption, the Court clearly warned that its preliminary conclusions, which were based on the preliminary injunction "likelihood of success" standard, were not based on a full examination of the record or the governing law and were subject to revision.[42]

The Legislature's own attorney, Jeff Archer, advised them accordingly. JX-14.4 at 6-19; *id.* at 11 (noting that this Court was "in a little bit [of a] tricky [position] because the Court had not made full determinations, . . . had not made fact findings on every issue, had not thoroughly analyzed all the evidence but they had to make some best case guesses . . . ."); *id.* at 11-12 (the Court's

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[42] The Court noted, "It is especially difficult to determine whether a claim has a likelihood of success when the law is unsettled, as many areas of § 2 are." Docket no. 691 at 1-2. In addition, this Court was required to defer substantially to the legislative choices and district lines in Plan C185 and Plan H283, and emphasized that its determinations were preliminary and made on an expedited basis. Although the Court endeavored under the time constraints to ensure that the plan contained no legal defects, it did not guarantee that to be the case, and in fact warned repeatedly that its determinations could change after a full trial on the merits.

caveats were "as if to say this is the best we can do now. We haven't gotten to the bottom of things."); *id.* at 12 (noting that the Court was not making final determinations, that the Court noted unsettled and difficult legal issues and factual disputes, and "essentially made it explicitly clear that this was an interim plan to address basically first impression of voting rights issues").[43] Given the remaining legal challenges and this Court's warnings that the interim maps were enacted without a full review of the facts or the law, a reasonable construction of this Court's orders leaves the definite possibility that, upon full review, additional changes would be required to the interim plans in response to legal infirmities.

Moreover, given the D.C. Court's findings of intentional discrimination, Defendants saw a very real possibility that this Court would likewise find that the 2011 plans were the product of discriminatory intent.[44] Rather than trying to cleanse the plans of continuing discriminatory intent or legal defect, Defendants' strategy involved adopting the interim maps, however flawed, arguing that the 2011 plans would never go into

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[43] At a later committee hearing, Archer correctly explained this Court's position: this Court faced "a tension there between what they thought the Voting Rights Act required and what they thought the deference they had to give until they were sure what the Voting Rights Act required." JX-15.3 at 52. He also noted that "they could go into a lot more issues than they already have." *Id.* at 49.

[44] And they were aware that, even if the Supreme Court ruled in *Shelby County* that § 4's preclearance coverage formula was unconstitutional, such a finding of intentional discrimination could result in Texas being placed under § 5 through bail in.

effect and thus could have no harmful effects, and arguing that the 2013 plans could have no impermissible intent such that, whatever possible or likely discriminatory or unconstitutional effects remained in those plans, Plaintiffs would have no remedy, and Defendants would maintain the benefit of such discrimination or unconstitutional effects. By arguing that there may have been intent but no effect in 2011 and there may have been effect but no intent in 2013, despite the fact that there is unquestionably both intent and ongoing effect, Defendants' actions in 2013 were attempting to prevent Plaintiffs from obtaining relief for purposeful racial discrimination.

In Defendants' view, Plaintiffs could obtain no relief for the Legislature's past discrimination in 2011, and any discriminatory intent and effects remaining in the 2013 plans, however harmful, would be safe from challenge.[45]

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[45] The Legislature did not believe that passing the interim maps would end the litigation. They knew that Plaintiffs would pursue claims against the interim maps, and they were informed by TLC attorney Jeff Archer that they had not realistically removed legal challenges to the plans apart from those areas remedied by the interim plans. JX-14.4 at 18; *id.* at 19 (explaining that "challenges to both the Court drawn fixes as well as to the background districts that were not changed in any of the plans will go forward" and "the parties to the case will continue to press issues"); JX-15.3 at 56 ("I think it's fair to say by enacting the Court-ordered plan, you've put to bed . . . those issues that the Court identified so far. But I don't know that you put the rest to bed."). Despite knowing that Plaintiffs would continue to pursue relief, they sought to deprive Plaintiffs of a potential remedy. Further, because they felt their strategy would preclude any remedy and they wanted to maintain any partisan advantage obtained regardless of whether it was the result of intentional racial discrimination, they were not truly interested in fixing any remaining

This strategy is discriminatory at its heart and should not insulate either plan from review. *Cf. Kirksey v. Bd. of Sup'rs of Hinds Cty., Miss.*, 554 F.2d 139, 146-47 (5th Cir. 1977) ("Where a plan, though itself racially neutral, carries forward intentional and purposeful discriminatory denial of access that is already in effect, it is not constitutional. Its benign nature cannot insulate the redistricting government entity from the existent taint. If a neutral plan were permitted to have this effect, minorities presently denied access to political life for unconstitutional reasons could be walled off from relief against continuation of that denial.").

In sum, the Court concludes that the racially discriminatory intent and effects that it previously found in the 2011 plans carry over into the 2013 plans where those district lines remain unchanged. The discriminatory taint was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but be safe from remedy. The Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans.

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discrimination in the plan. Thus, although Darby kept stating that he wanted to be informed of legal deficiencies so he could fix them, he did not himself seek to have the plan evaluated for deficiencies and he willfully ignored those who pointed out deficiencies, continuing to emphasize that he had thought "from the start" that the interim plans were fully legal. JX-17.3 at S5. Defendants' strategy would leave Plaintiffs with § 2 effects claims only, and Defendants intended to continue vigorously opposing any plan with coalition districts, despite Fifth Circuit case law holding that such districts could be required. Tr1576-78 (Darby).

III. Dallas-Fort Worth area ("DFW") Claims

Plaintiffs brought § 2 results claims and intentional vote dilution claims, as well as Fourteenth Amendment racial discrimination claims against the DFW districts in Plan C185. Interim Plan C235 made significant changes to the DFW area to address the "not insubstantial" § 5 discriminatory purpose claims of packing and cracking. Plaintiffs alleged that CD30, the only minority district, was packed, while "fingers" from surrounding Anglo-majority districts reached into urban and suburban Dallas and Tarrant County areas to crack minority communities and subsume them in Anglo-dominated districts. As a result, despite its substantial minority population, the DFW metroplex had only one minority opportunity district (CD30) that performed for African Americans, and none for Latino voters.

To address the § 5 discrimination claims, Plan C235 included new CD33, spanning Dallas and Tarrant Counties. Plan C235 withdrew many of the encroachments into minority communities from the Anglo districts surrounding DFW, and the population left behind in DFW from the removed encroachments was placed in new CD33, while accommodating congressional incumbents and taking into account population growth. Docket no. 691 at 36-37. In addition, the minority population of CD30 was decreased somewhat to address the packing allegations, with the Court noting that the H+BVAP of CD30 was 76.7% in the benchmark, 81.5% in

Plan C185, and 75.9% in Plan C235. *Id.* at 37 & n.83.[46] Given the unsettled law and the inability to look at all the necessary factual evidence, the Court was unable to conclude at the time that Plaintiffs were likely to succeed on their § 2 claims premised upon coalition districts. It also found that the Task Force Plaintiffs were not likely to succeed on their claim that a Latino opportunity district was required because their proposed HCVAP-majority district (CD6 in Plan C190) was not compact.

In the Opinion on Plan C185, this Court found that Plaintiffs failed to prove their § 2 results claims in DFW because they failed to satisfy the first *Gingles* precondition for the Latino and coalition districts insofar as none of the proposed districts were compact. Docket no. 1390 at 58-92.[47] The Court did find that mapdrawers violated the Equal Protection Clause by improperly using race in drawing CD26 in violation of the *Shaw* line of cases. And, it found that mapdrawers acted with racially discriminatory intent and intentionally diluted minority voting strength in DFW by intentionally packing and cracking minorities. Docket no. 1390 at 146. Specifically, the Court found that minorities were moved into CD30 to waste their votes, while Anglo voters were moved out of CD30 and into neighboring districts to shore them up as Republican districts, and that mapdrawers drew and then

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[46] CD30 was also altered to address the intentional discrimination claims brought by African-American Congressperson Eddie Bernice Johnson, who represented CD30.

[47] However, Plaintiffs were not precluded from bringing § 2 results claims against Plan C235 based on the *Gingles* preconditions and the totality of circumstances in 2013.

divided a proposed minority district in the DFW area to minimize current and future minority voting power.

The Plaintiffs' packing and cracking intentional discrimination/dilution claim in this case is essentially the same "not insubstantial" § 5 discriminatory purpose claim that the Court attempted to remedy in Plan C235, but certain Plaintiffs complain that the discrimination is not fully remedied. They contend that packing and cracking remain, intended to prevent the emergence of an additional minority district or districts. Plaintiffs assert that two or three minority opportunity districts are required in addition to CD30 and that the DFW configuration intentionally limits minority opportunity to two districts when more opportunity districts can easily be drawn. The Quesada Plaintiffs further contend that the Legislature intentionally discriminated by knowingly reaffirming discriminatory features identified by the D.C. Court, including specifically the cracking of minority populations in Arlington and Grand Prairie.

As explained in the Court's order adopting Plan C235, CD33 was not intentionally drawn as a minority coalition district under § 2. Rather, it was created to remedy the alleged intentional discrimination (cracking) claims by removing the fingers from the Anglo-majority districts that reached into Dallas and Fort Worth. However, it is majority-minority CVAP when Black and Hispanic CVAP are combined, and it has elected an African-American, Marc Veasey. It has thus performed as a minority coalition district under most Plaintiffs' view that such districts require minority cohesion only in the general

elections.[48] On this basis, the Court concluded in its Order on Plan C185 that Plaintiffs' claims that one minority coalition district was required in DFW (in addition to African-American district CD30) were moot.

However, Plaintiffs continue to assert that more minority opportunity districts are required in DFW, especially one that can elect a Latino candidate of choice in the primary and general elections, to reflect the Latino growth in the area. Certain Plaintiffs contend that CD33 does not provide Latino opportunity because of its failure to elect the Latino-preferred candidate in the primary despite its HCVAP.[49]

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[48] The Task Force does not share this view, but the Task Force also has not sought the creation of any coalition districts in DFW. Rather, the Task Force sought only the creation of an HCVAP-majority Latino opportunity district. However, the Task Force's proposed district (CD6 in Plan C190) was not compact, and because of the dispersion of Latinos among African Americans, a compact HCVAP-majority district cannot be drawn in DFW using 2011-2015 ACS data.

Other Plaintiffs did seek the creation of a coalition district in DFW, however. And although several of these Plaintiffs (except the Rodriguez Plaintiffs) now contend that CD33 is not a coalition opportunity district but an African-American opportunity district because African-American voters are controlling the Democratic primaries, these Plaintiffs also contend that coalition opportunity for purposes of a *Gingles* results claim should be determined by the general elections, not primaries. Thus, their prior claim that one coalition district was required in DFW under the § 2 results test was mooted by the drawing of a district that performs as a coalition district in the general election.

[49] The Rodriguez Plaintiffs do not challenge CD33 itself, but contend that its configuration "demonstrates the tortured lines the State had to draw in order to avoid creating an additional opportunity district for minorities in Texas." Docket no. 1524 at 24 n.21. They

Defendants contend that (1) there is no evidence of dilutive intent in 2013, (2) no single-minority-majority-CVAP district can be drawn and coalition districts are not required by § 2, and (3) even if coalition districts were required, the record refutes the existence of cohesive voting between Hispanic and African-American voters in the DFW area, as shown primarily by the results of Democratic primaries. Docket no. 1526 at 81-82. The Court has already rejected Defendants' position that coalition districts can never be required by § 2, and does not repeat its analysis here. And the doctrine of constitutional avoidance counsels that this Court should address the statutory § 2 effects claim before analyzing Plaintiffs' constitutional claim. The Court thus considers whether Plaintiffs have satisfied the *Gingles* criteria.

Plaintiffs[50] agree that, despite the strong minority population growth in DFW, it is not possible to draw an additional compact single minority-majority CVAP district. This is due primarily to the fact that minority populations are interspersed with each other, although

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assert that it does not fix the cracking and packing this Court found in DFW under Plan C185 or "mask the hallmarks of intentional discrimination that persist in DFW under Plan C235," but "only highlights and perpetuates the State's consistent approach of cracking minority populations in DFW to avoid what would otherwise be inevitable: increased electoral opportunities for minority voters." *Id.*

[50] In this section, "Plaintiffs" generally refers to Plaintiffs other than the Task Force. Presumably the Task Force Plaintiffs, who previously argued that their proposed HCVAP-majority district was compact, do not agree that no compact HCVAP-majority can be drawn in DFW. In addition, the Task Force Plaintiffs have asserted no claims against DFW in Plan C235.

these mixed minority populations are geographically concentrated. As a result, each of the proposed demonstration maps creates new minority coalition districts. The Court did not reach the issue of minority cohesion in proposed coalition districts in its prior orders because Plaintiffs did not clear the first *Gingles* hurdle. But the issue is now squarely presented. The Court acknowledges that the evidence presented in this case cuts both ways and the decision is close, but the Court concludes that Plaintiffs have not proved the necessary cohesion.

A. § 2 Results Claims

Gingles 1

Plaintiffs' demonstration plans C284 (NAACP), C273 (Quesada), and C286 (Rodriguez) generally take the same approach and create one additional minority coalition district (in addition to maintaining CD30 and CD33 as minority opportunity districts). Existing CD33, which spans Dallas and Tarrant Counties, is pushed entirely into Tarrant County and made much more compact. It remains a B+HCVAP-majority district, but its HCVAP is decreased and its BCVAP increased.[51] CD30, the existing BCVAP-majority opportunity district, generally maintains a similar location wholly within Dallas County, and its BCVAP remains above or near 50%.[52] The maps

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[51] In Plan C235, it is 43.6% HCVAP and 23.7% Black Alone CVAP. In Plan C273, it is 23.4% HCVAP and 30.8% Black Alone CVAP. In Plan C284, it is 22.8% HCVAP and 29.4% Black Alone CVAP. In Plan C286, it is 24.6% HCVAP and 30% Black Alone CVAP.

[52] In Plan C235, CD30 is 53.2% BCVAP. In Plan C273, it is 49.8% Black Alone CVAP but 50.4% combined BCVAP. In Plan C284, it is

create the new coalition district in between CD30 and CD33, and each district has a combined H+BCVAP above 50%.[53] Thus, each district satisfies the numerosity threshold, and all three demonstration maps contain one more minority-majority district in DFW than does Plan C235.[54] In addition, based on a review of all the evidence, the Court finds that these districts reflect compact minority communities, including the various mixed-minority cities and neighborhoods within the DFW metroplex and respecting traditional redistricting principles and non-racial communities of interest.[55] *See*

50% Black Alone CVAP and 50.6% combined BCVAP. In Plan C286, it is 54% BCVAP.

[53] In Plan C273, proposed CD3 is 38.4% HCVAP and 19.6% Black Alone CVAP. In Plan C284, proposed CD24 is 39.8% HCVAP and 19.1% Black Alone CVAP. In Plan C286, proposed CD24 is 36.1% HCVAP and 18.7% Black Alone CVAP.

[54] MALC Plan C285 creates an additional coalition district to the east of CD30.

[55] Given its conclusion on cohesion, the Court finds it unnecessary to detail all of the evidence here. But it notes that Dr. Ansolabahere did not set out to draw minority districts in Plan C286, but sought to adhere to municipal boundaries and compactness principles and to avoid dividing minority populations; as a result, his CD24 encompasses the adjacent, majority-minority cities of Irving and Grand Prairie and adds western Dallas and the City of Farmers Branch. CD30 retains its relatively compact shape and includes southern and eastern Dallas and all of the smaller municipalities to the south inside Dallas County. CD33 respects county lines by remaining wholly within Tarrant County and includes population from Fort Worth and Arlington. Its northwestern protrusion somewhat tracks that in Plan C235 but widens the neck and avoids splitting Sansom Park. The northeastern portion is widened and eliminates the protrusion into Forth Worth, and includes all of eastern Arlington rather than the precisely cut out areas in Plan

LULAC v. Perry, 548 U.S. 399, 433 (2006) (recognition of nonracial communities of interest reflects the principle that a state may not assume that members of the same race will share the same political interests and prefer the same candidates).

2. *Gingles* 2

Minority political cohesion is the second *Gingles* precondition, and is the focus of the parties' disagreement in this phase of the litigation. The purpose of this inquiry is "to ascertain whether minority group members constitute a politically cohesive unit." *Gingles*, 478 U.S. at 56. *Gingles* states that "[a] showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and, consequently, establish[ing] minority bloc voting within the context of § 2." *Gingles*, 478 U.S. at 56 (citation omitted). The Supreme Court in *Gingles* did not say that primary cohesion was required, but did note that political cohesiveness of black voters was clearly established where "black voters' support for black candidates was overwhelming in almost every election. In all but 5 of 16 primary elections, black support for black candidates ranged between 71% and 92%; and in the general

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C235. Further, it follows the general contours of CD33 in Plan C235 along the eastern edge of Fort Worth, but follows the Fort Worth municipal boundary on the eastern side instead of leaving small areas out of the district as in Plan C235. The Court further relies on Dr. Fairfax's analysis of NAACP Plan C284 and testimony from lay witnesses Franklin Moss and Rep. Toni Rose.

elections, black support for black Democratic candidates ranged between 87% and 96%." *Id.* at 59.

The Supreme Court has not offered specific guidance on proving cohesion in a coalition context, other than to say that "when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential" and there is a "higher-than-usual need for the second of the *Gingles* showings." *Growe v. Emison*, 507 U.S. 25, 41 (1993). This indicates that proof of cohesion is essential for coalition claims, but does not indicate that the standard for proving such cohesion is necessarily any different for coalitions than for single minorities.

In *Campos v. City of Baytown*, Tex., 840 F.2d 1240, 1244 (5th Cir. 1988), the Fifth Circuit held that, "[t]o prove the fact of their electoral dilution, plaintiffs must prove that the minorities so identified actually vote together and are impeded in their ability to elect their own candidates by all of the circumstances, including especially the bloc voting of a white majority that usually defeats the candidate of the minority." It noted that "the central focus" for the cohesion inquiry is upon voting patterns, and a minority group is politically cohesive if it votes together. *Id.* The court continued,

> the proper standard is the same as *Gingles*: whether the minority group together votes in a cohesive manner for the minority candidate. . . . The key is the minority group as a whole. Of course, if one part of the group cannot be expected to vote with the other part, the combination is not cohesive. If the evidence were to show that the Blacks vote against a Hispanic candidate, or *vice*

> *versa*, then the minority group could not be said to be cohesive. But if the statistical evidence is that Blacks and Hispanics together vote for the Black or Hispanic candidate, then cohesion is shown.

Id. at 1245 (footnote omitted). *Campos* does not specify in which election this voting pattern is relevant or necessary, and it does not mention primaries.

In *Overton v. City of Austin*, 871 F.2d 529, 544 (5th Cir. 1989), the Fifth Circuit looked at whether black and Mexican-American voters "usually combine[d] to support candidates who were usually disfavored by Anglo voters," but there was no discussion of primary elections.

In *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989), the court considered cohesion among Hispanics, African Americans, and Asians in school board member elections and stated, "The determinative question is whether black-supported candidates receive a majority of the Hispanic and Asian vote; whether Hispanic-supported candidates receive a majority of the black and Asian vote; and whether Asian-supported candidates receive a majority of the black and Hispanic vote in most instances in the KISD area." *Id.* at 453 (citing *Campos*, 840 F.2d at 1244-45). There was no statistical evidence from the plaintiffs, and lay witness testimony differed on political cohesion among these groups. One expert's multivariate regression analysis showed African Americans and Hispanics were in direct opposition in most KISD elections in which minority candidates ran, and this evidence was unrebutted. The Court found that cohesion was lacking. This case sheds no specific light on the primary issue, however.

In *Session v. Perry*, 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004), the district court rejected plaintiffs' coalition claim in DFW because "there is no serious dispute but that Blacks and Hispanics do not vote cohesively in primary elections, where their allegiance is free of party affiliation."[56] On appeal, the Supreme Court did not consider whether such lack of primary cohesion was important, instead "[a]ccepting . . . that African-Americans do not vote cohesively with Hispanics." *LULAC v. Perry*, 548 U.S. 399, 443 (2006). It accepted this fact to decide the question presented on appeal, which was not whether African Americans and Hispanics were politically cohesive, but whether African Americans had effective control of CD24, even though African Americans made up only 25.7% of the district's CVAP. The plaintiffs argued that they could control the district because they were 64% of voters in the Democratic primary, and that their control of the primary translated into effective control of the entire election.

The district court rejected the argument that African Americans could control the primary because the district was drawn for an Anglo Democrat (Frost), who had no opposition in any primary since his incumbency began, and CD24's demographics were similar to another district

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[56] The district court also stated that, even assuming Blacks and Hispanics vote cohesively, they must disprove partisanship as the driving force behind the bloc voting, citing *LULAC v. Clements*, 999 F.2d 831, 850 (1993) (en banc). *Session*, 298 F. Supp. 2d at 478 n.88. The parties in this case vigorously dispute the application of *LULAC v. Clements* and whether the role of partisanship must be disproved as a cause of racial voting behavior. Because the Court does not find cohesion, it does not address this dispute.

where an African-American candidate failed when he ran against an Anglo. Instead, the district court found that the district was controlled by Anglo Democrats. On appeal, the Supreme Court found no clear error in this finding, stating that the lack of any contested Democratic primary over the last 20 years left "no obvious benchmark . . . for deciding whether African-Americans could elect their candidate of choice." *LULAC*, 548 at 444. It continued,

> The fact that African-Americans voted for Frost—in the primary and general elections—could signify he is their candidate of choice. Without a contested primary, however, it could also be interpreted to show (assuming racial bloc voting) that Anglos and Latinos would vote in the Democratic primary in greater numbers if an African-American candidate of choice were to run, especially given Texas's open primary system. The District Court heard trial testimony that would support both explanations, and we cannot say that it erred in crediting the testimony that endorsed the latter interpretation.

LULAC, 548 U.S. at 444. The Court continued,

> The opportunity "to elect representatives of their choice," requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice. There is no doubt African-Americans preferred Martin Frost to the Republicans who opposed him. The fact that African-Americans preferred Frost to some others does not, however, make him their candidate of choice. Accordingly, the ability to aid in Frost's election does not make the old District 24 an

> African-American opportunity district for purposes of § 2. If § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.

Id. at 445-46 (internal citations omitted).

Defendants contend that this language is dispositive of the issue of the role of primaries in cohesion, and that without evidence of cohesion in contested primaries, no coalition claim can be proved. But the Supreme Court did not consider the issue of minority cohesion at all. The Court looked only to the factual question of whether African-Americans actually had the ability to control outcomes in the district, and that fact could not be determined without showing ability to control the primaries. African-American voters were turning out in greater numbers than others in the primary. While this was de facto control, it did not translate into actual control of the primary, because the primary was uncontested—Anglo voters who controlled the district and originally sponsored Frost simply did not feel the need to turn out in the primary because their preferred candidate would emerge regardless. If an African-American (or presumably, African-American-sponsored but not necessarily African-American) candidate did run in the primary, there was no guarantee that candidate would win because African-American voters could be easily outnumbered.

Thus, even though African Americans were voting for Frost in both the primary and the general elections, this did not automatically make Frost their candidate of choice. The evidence credited by the courts showed it was

likely that they were merely voting for the candidate they were permitted to vote for by the Anglos who controlled the district. Thus, because they could not show that they actually controlled the district, as opposed to simply voting along with Anglos who in fact controlled the district, their claim failed.

This discussion in *LULAC* highlights the intensely local and factual appraisal required by § 2 claims, and it indicates that primaries can aid courts in determining voters' candidates of choice—not only by considering who voters are voting for in the primaries (which is relevant to which candidates they prefer), but considering all the relevant circumstances. *LULAC* supports the conclusion that primaries should not be excluded from the minority cohesion analysis, but it does not answer the question of the weight to be given particular primary voting patterns in determining cohesion in this case.

Thus, the current case law from the Fifth Circuit and Supreme Court confirms that primaries are relevant, but provides little guidance on their probative value. Cases outside the Fifth Circuit take conflicting views. In *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 421 (S.D.N.Y.), *aff'd*, 543 U.S. 997 (2004), the court held that when the two minority groups are generally affiliated with the same party and vote for that party's candidates at high rates, primaries are by far the most probative evidence of cohesion. The court relied on lack of primary cohesion and "the fact that the plaintiffs have presented cohesion evidence for a very limited portion of their proposed district" to find that plaintiffs failed to prove Black-Hispanic political cohesion. *Id.* at 422.

In contrast, the D.C. Court in the § 5 preclearance litigation rejected Texas's reliance on primaries in considering HD149 in the Houston area. It noted that there was persuasive evidence of both concerted efforts among a coalition to elect its preferred candidates and a pattern of success extending across multiple election cycles. *Texas v. United States*, 887 F. Supp. 2d 133, 174 (D.D.C. 2012). Texas argued that the minority groups "do not vote cohesively in primaries and only come together to agree on a second- or third-best candidate in time for the general election" and "this does not prove an effective coalition district." *Id.* The D.C. Court stated,

> We agree that evidence of shared voting preferences at the primary level would be powerful evidence of a working coalition, but it is not needed to prove cohesion. In the first place, there is little support for Texas's focus on primary elections. Texas cites *LULAC* for this point, but *LULAC*, a section 2 case, only talks about primaries as a method to determine one minority group's candidate of choice; it says nothing about the need for two groups in a putative coalition to vote cohesively in a primary. More importantly, it does not hold that evidence of cohesion in a primary is necessary to identify a candidate of choice. The same is true here, where there has been no contested endogenous Democratic primary since 2004, when Rep. Vo first won his seat. Texas also cites two district court cases that rely on primary cohesion, *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 421 (S.D.N.Y. 2004); and *Session v. Perry*, 298 F. Supp. 2d 451, 478 (E.D.Tex. 2004), but these cases

represent the minority view. Most courts to address this issue have expressed no preference about the election level at which voting cohesion must be shown. *See, e.g., Lewis v. Alamance Cnty.*, 99 F.3d 600, 615 (4th Cir. 1996); *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 886 (5th Cir. 1993) (en banc); *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 276 (2d Cir. 1994), *vacated and remanded on other grounds*, 512 U.S. 1283, 115 S.Ct. 35, 129 L.Ed.2d 931 (1994).

We agree with the majority view. Courts regularly consider general election data to demonstrate voter cohesion in traditional majority-minority districts, without any indication that such a showing is insufficient without evidence of voter cohesion in the primary as well. Additionally, requiring cohesion in the primary election distorts the role of the primary. Although minority groups sometimes coalesce around a candidate at that point in time, minority voters, like any other voters, use the primary to help develop their preferences. We refuse to penalize minority voters for acting like other groups in a political party who do not coalesce around a candidate until the race is on for the general election. *See Alamance Cnty.*, 99 F.3d at 614-16 ("We reject the proposition that success of a minority-preferred candidate in a general election is entitled to less weight when a candidate with far greater minority support was defeated in the primary.... [S]uch a view is grounded in the belief that minority voters

> essentially take their marbles and go home whenever the candidate whom they prefer most in the primary does not prevail, a belief about minority voters that we do not share." (citation and internal quotation marks omitted)). "Pull, haul, and trade" describes the task of minority and majority voters alike, and candidates may be minority "candidates of choice" even if they do not "represent perfection to every minority voter."

Texas, 887 F. Supp. 2d at 174-75 (some citations omitted).[57]

Plaintiffs argue that they have shown the required cohesion in DFW through expert and lay testimony. Plaintiffs and their experts assert that the relevant focus is on which party primaries minorities choose and their

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[57] The Court notes that *Lewis v. Alamance County*, 99 F.3d 600 (4th Cir. 1996) was not a case about minority cohesion. Rather, the Fourth Circuit was evaluating whether the district court properly determined that the plaintiffs had failed to show that black-preferred candidates were usually defeated. In that regard, the plaintiffs argued that Democrats should be treated as black-preferred only if they were also black-preferred in the primary. The Fourth Circuit rejected that argument, holding that candidates who receive strong black support in general elections are the black-preferred candidate in that election, regardless of their level of support in the primary, and the elections should be counted accordingly in the determination of whether black-preferred candidates were usually defeated. *Id.* at 615. The Court also held that primary elections and general elections must be analyzed separately to determine whether black-preferred candidates were usually successful, to be sure that the regular defeat in one of these phases would not be masked by repeated successes in the other. *Id.* at 615. If anything, this case supports the argument that a court considering cohesion should also look at primaries.

general election cohesion, and that a lack of cohesion in the primaries should be considered irrelevant or, if relevant, should not undermine a finding of cohesion. They note that Defendants' expert, Dr. Alford, admitted that one way for minorities to show that they are politically cohesive is to coalesce around a major political party. Tr1443. Defendants, on the other hand, argue that focusing on the Democratic primaries is essential, and that Plaintiffs cannot establish minority political cohesion without proof of primary cohesion. Their expert, Dr. Alford, has consistently opined that "Blacks and Hispanics do not vote cohesively in either party [primary], and in fact are more likely than not to oppose each other's preferred candidates." Alford 2014 Supp. Report at 15.

Plaintiffs' experts offered various bases for their positions that the key focus should be on general election cohesion. These were generally that: (1) the general elections are the "key" or operative contests for electing candidates of choice; (2) the general elections involve many more voters and primary participation is small; (3) primary voters do not accurately reflect the voting population and are "skewed," and may even involve members of the other party because Texas has open primaries; (4) primary voting may be strategic wherein voters vote for second or third choice candidates because they believe they have a better chance at success in the general election. *See* docket no. 1340 ¶¶ 700-702; Tr1052, Tr1203-05 (Ansolabahere); Tr410-11 (Chervenak); Tr98, Tr114-15 (Brischetto). All of these factors affect the probative value of primary elections, but they do not require us to ignore primary elections altogether. As Dr. Alford explains, primaries reflect actual voting behavior,

still involve a significant number of voters, and are an integral part of the process leading to election of candidates. Tr1364, Tr1461. Because the most pertinent indicator of political behavior is voting behavior, this Court finds that primary elections should be considered as part of the minority group's overall voting behavior, but will give the primaries the weight the evidence shows that they deserve.

This Court previously made certain fact findings relevant to the issue of cohesion. The Court noted that there is a strong correlation between partisanship and ethnicity in current Texas politics, and that African Americans and Latinos have tended to identify with the Democratic party in recent years due to shared issues, lack of Republican vote courting, and the rise of the Tea Party, while more Anglos have shifted to the Republican party. Docket no. 1340 ¶¶ 678, 681. This has been more true for Latinos in recent years because Republicans have not done a very good job of reaching out to Latinos and some party positions on immigration do not attract Latinos. *Id.* ¶ 680. African Americans and Latinos share many common interests and generally feel that the Democratic party is more responsive to those interests.

Evidence from prior phases of this litigation consistently showed that, statewide, African Americans and Latinos choose to participate in Democratic primaries rather than Republican primaries[58] and consistently

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[58] Docket no. 1340 ¶ 683 ("There is almost no African-American voter participation in the Republican primaries, and very little Hispanic participation."); *id.* ¶ 684 ("Dr. Lichtman found that Latino and African-American voters in Texas are cohesive in that both voter

support the Democratic candidates in general elections, regardless of their race. Docket no. 1340 ¶¶ 688, 696, 697, 706.[59] However, in the Democratic primaries originally studied by Dr. Engstrom (primaries for statewide offices in 2008 and 2010), he found that non-Latinos (which included both African American and Anglo voters) did not consistently share the candidate preferences of Latino voters. African-American voters shared support for only one of five primary candidates preferred by Latinos in Dallas and Tarrant Counties. Docket no. 1340 ¶ 685.

In his corrected Rebuttal report, Engstrom found that Latino voters were very cohesive in their preferences for Latino candidates in Democratic primaries but African-American support for Latino-preferred candidates was not typically present in primaries and, in fact, African-American voters had "a distinct tendency to vote for candidates competing with the candidates preferred by Latinos in primary elections." *Id.* ¶ 686. Dr. Alford also concluded that African-American and Hispanic voters are not generally cohesive in the Democratic primary, and that the polarization is based on the ethnicity of the candidates such that a "Black candidate will not typically be the candidate of choice of Hispanic voters in the Democratic primary" and "the Hispanic candidate will

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groups overwhelmingly choose to participate in Democratic rather than Republican primaries.").

[59] This trend was so strong that Dr. Alford assessed whether districts were minority opportunity districts by looking at Democrat wins/losses and noted that in Texas, minority candidates of choice means Democrats. Docket no. 1340 ¶ 688. In this phase of the litigation, many of Plaintiffs' experts have taken a similar approach in assessing performance for minority districts.

typically not be the candidate of choice of Black voters in the Democrat primary." *Id.* ¶ 687. Kousser also found that Latinos and African Americans were not cohesive in the Democratic primary, with Latinos voting for Latino candidates but African Americans not tending to support Latino candidates in the 2010 Democratic primaries. *Id.*

Based on all the prior evidence, this Court found that in general, Hispanic voters are politically cohesive in general and primary elections, African-American voters are politically cohesive in general and primary elections, Latinos and African Americans are often *not* cohesive within the Democratic primary, and African-American and Latino voters are politically cohesive in general elections in support of the Democratic candidate, regardless of the candidate's race. Docket no. 1340 ¶¶ 703-706. However, *Gingles* requires a local appraisal for minority cohesion. *See Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989) ("Our recent opinion in *Overton v. City of Austin* cautions against reaching conclusions about inter-minority cohesion absent a diligent inquiry into the political dynamics of the particular community.").

It is undisputed that African-American and Latino voters show very high rates of cohesion in general elections in Texas in general and specifically in Dallas and Tarrant Counties. Dr. Ansolabahere testified that, based on his analysis, African-American and Latino voters vote cohesively in the general elections to elect their preferred candidates. Tr1201; Rod-955 (Table 9) (in Dallas County and Tarrant County Black support for Democratic candidates was estimated at 100%, while Latino support ranged from 68.4% to 81.7% in Dallas County and 71.5% to 80.6% in Tarrant County). Dr. Lichtman's ecological

regression analysis found near-perfect cohesion in support of the Democratic candidate between African American and Latino voters in the five 2008 and 2010 general elections he studied: In Tarrant County both estimates were 100% and in Dallas County both estimates were 99%. Joint Expert Ex. E-3 Table 2.

Dr. Engstrom previously found that Latinos in Dallas County supported the Latino candidate at high levels, between 81.1 and 88% and African-American support was over 90% in all general elections. Docket no. 307-1 at 13. In Tarrant County, Dr. Engstrom found that Latinos supported the Latino candidate at high levels, between 84.3 and 98.3%, and African-American support was above 90% in all elections. Docket no. 307-1 at 18-19. Dr. Engstrom's 2017 analysis reveals that this trend generally continued in 2014 and 2016. TF-19. In Dallas County, Latinos supported Latino Democrat candidates at rates of 78.3, 73.4, and 87.2% and African Americans at 95.5, 94.9, and 92.9%. In Tarrant County, Latinos supported Latino Democrat candidates at rates of 81.2, 78.6, and 88.1%, and African Americans at 92.7, 92, and 92.4%. TF-19.

Chervenak's racially polarized voting analysis of recent elections within Dallas County and Tarrant County also found high levels of cohesion, with each group supporting candidates from both racial groups, and other voters not sharing their preferences. NAACP-2 at 6-8; Tr105 (Brischetto) ("The minority candidate of choice in the general elections have been the Democratic candidate in each case.").

It is also undisputed that African Americans and Latinos primarily choose to participate in Democratic

primaries. With regard to choice of primary, Dr. Lichtman previously looked at individual counties. Joint Expert Ex. E-3. In Dallas County, he found that African Americans participated in the 2008 Democratic Primary at a rate of 97.52% and Latinos at a rate of 88.72%. African Americans participated in the 2010 Democratic Primary at a rate of 90.43% and Latinos at a rate of 59.21%. In Tarrant County, he found that African Americans participated in the 2008 Democratic Primary at a rate of 96.33% and Latinos at a rate of 83.54%. In the 2010 Democratic Primary, African Americans participated at a rate of 81.25% and Latinos at a rate of 31.66%. Lichtman noted that the lower Latino participation in 2010 was likely due to relatively small numbers of Latino voters participating at all, and there was much lower Hispanic participation in Democratic primaries in 2010 than 2008, while Hispanic participation in Republican primaries remained relatively constant. Joint Expert Ex. E-3 at 5-6, Table 1. Dr. Engstrom also noted that "[t]he number of Latinos receiving ballots in the 2014 Democratic primary substantially exceeded those in the Republican primary that year." TF-19 at 6 n.2 (in Dallas County, 6,859 Democrat and 3,579 Republican, in Tarrant County 5,816 Democrat and 4,108 Republican).[60]

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[60] Dr. Lichtman's analysis of participation in the 2008 and 2010 Democratic primaries showed that many more African Americans vote in the primaries than do Latinos: In 2008 in Dallas County, 37,859 Hispanics voted while 86,528 African Americans voted. In 2010, 6,771 Hispanics voted while 23,522 African Americans voted. In 2008 in Tarrant County, 24,472 Hispanics voted while 36,116 African Americans voted. In 2010, 2,239 Hispanics voted, while 6,988 African Americans voted. Joint Expert Ex. E-3 Table 1.

However, Defendants contend that, without proving cohesion in the Democratic primaries, Plaintiffs cannot establish *Gingles* 2 for coalition districts. As noted, though African Americans and Latinos are choosing to vote in the Democratic primaries, they are often not cohesive in Democratic primaries, and that remains true in certain Democratic primaries in Tarrant and Dallas Counties. Dr. Engstrom previously analyzed statewide elections in 2006, 2008, and 2010, and found that African Americans were "the least likely group [between African Americans and 'others'] to support Latino candidates in Democratic primaries" in Dallas County and that African Americans supported the Latino candidate in only one of six primaries in Tarrant County. Docket no. 307-1 at 15, 20-21, Tables 5 & 7. There were no Democratic primaries in 2012 that met his inclusion criteria. Dr. Engstrom performed an updated primary analysis in 2017, but it includes only the 2010 Democratic primary for Governor with two candidates, Latino Reynaldo Madrigal and Anglo Wendy Davis. Madrigal was not the choice of Latino voters or African-American voters in either Dallas or Tarrant County, though he received higher Latino support (30.9% in Dallas County and 26.5% in Tarrant County) than African-American support (1.9% in Dallas County and .2% in Tarrant County). TF-19. Dr. Alford casts this primary as non-competitive and suggesting "at most that in a very non-competitive contest, the winning Anglo candidate was the choice of Anglos, Blacks, and Hispanics." D-878 (Alford 2017 Report) at 10.

The results of Dr. Engstrom's analyses for Democratic primaries in Dallas and Tarrant Counties are set forth in the following tables:

Dallas County

	African American voters	Latino voters	Other voters
2006 Dem. Primary Lt. Gov. (Alvarado)	27.2 24.5 - 29.9	50.5 46.6 - 54.5	43.2 41.4 - 45.0
2006 Dem. Primary Lt. Gov. Runoff (Alvarado)	34.8 31.8 - 37.6	60.2 52.2 - 68.7	43.4 40.6 - 46.3
2008 Dem. Primary US Senate (Noriega)	44.1 42.6 - 45.6	73.8 71.2 - 76.4	54.0 52.8 - 55.2
2008 Dem. Primary Sup. Ct. Pl. 7 (Cruz)	27.6 26.3 - 28.8	75.8 73.6 - 78.0	30.6 29.6 - 31.7
2008 Dem. Primary Sup. Ct. Pl. 8 (Yanez)	52.7 51.4 - 53.9	87.8 85.9 - 89.7	44.3 43.1 - 45.4

2010 Dem. Primary Lt. Gov. (Chavez-Thompson)	47.0 45.3 - 48.8	77.6 74.3 - 81.0	31.5 30.0 - 32.9
2010 Dem. Primary Land Comm'r (Uribe)	27.2 25.1 - 29.2	64.6 60.6 - 68.9	51.7 50.0 - 53.4
2014 Dem. Primary Governor (Madrigal)	1.9 0.8 - 3.2	30.9 26.4 - 34.7	2.7 1.5 - 4.0

Tarrant County

	African American voters	Latino voters	Other voters
2006 Dem. Primary Lt. Gov. (Alvarado)	30.8 25.5 - 35.8	46.2 39.0 - 53.5	45.3 43.1 - 47.5
2006 Dem. Primary Lt. Gov. Runoff (Alvarado)	30.4 25.5 - 35.1	66.1 56.4 -76.6	47.5 44.9 - 50.1
2008 Dem. Primary US Senate (Noriega)	66.0 63.4 - 68.7	72.4 68.2 - 76.9	51.5 50.5 - 52.5

2008 Dem. Primary Sup. Ct. Pl. 7 (Cruz)	27.6 24.2 - 30.9	79.4 74.2 - 85.1	31.2 30.0 - 32.4
2008 Dem. Primary Sup. Ct. Pl. 8 (Yanez)	42.2 38.9 - 45.5	85.0 80.6 - 89.6	40.5 39.4 - 41.7
2010 Dem. Primary Lt. Gov. (Chavez-Thompson)	42.9 38.5 - 47.2	73.3 67.3 - 79.7	39.6 38.3 - 41.0
2010 Dem. Primary Land Comm'r (Uribe)	24.1 19.1 - 28.8	64.3 57.1 - 72.0	35.4 33.8 - 36.9
2014 Dem. Primary Governor (Madrigal)	0.2 0.1 - 0.5	26.5 22.9 - 29.9	1.7 1.0 - 2.5

Dr. Chervenak examined the 2012 Democratic primary for HD 101 in Tarrant County. NAACP-2 at 8, 17. His analysis showed that the black candidate (Barnett) "was not the preferred candidate of either black or Latino voters." *Id.* at 8. At trial, Plaintiffs' counsel elicited testimony from Dr. Alford that neither group preferred the black candidate and "they're voting for the same candidate." Tr1477-78 (Alford); NAACP-2 at 8, 17. However, Dr. Chervenak's analysis does not indicate

whether and to what extent black and Latino voters coalesced in support of a candidate because there were two other candidates in addition to the black candidate.

The NAACP and African-American congresspersons note that, as shown in NAACP-46, there were many Democratic primary races in Dallas County in 2016 where Latino and African-American candidates were uncontested by members from the other race.

Dr. Alford notes that, in the current phase, the evidence relevant to minority cohesion in the Democratic primaries comes primarily from Dr. Engstrom. Reviewing that evidence, he concludes, as did Engstrom in his earlier report, that "they do not show Black-Hispanic cohesion, but instead, if anything, suggest opposition." D-878 at 10. He further notes that, aside from Engstrom's reports, there is "very little from the remaining [experts] that informs the question of cohesion in proposed coalition districts." *Id.* at 11. While Dr. Chervenak did include endogenous primaries, despite his position that only statewide general elections should be considered (due to a lack of sufficient elections), Alford notes that these only examine existing districts, and do not purport to demonstrate cohesion in primary elections in proposed districts.

Defendants further focus heavily on the primaries in HD90 in Tarrant County and CD33. Dr. Engstrom examined the 2012 HD90 Democratic primary using multivariate ecological inference. PL-967 at 7. He found 65.7% Latino support, 37.7% African-American support, and 30.2% non-minority support for the Latino candidate Carlos Vasquez against Anglo incumbent Lon Burnam. *Id.* at 7-8. There were 3,987 votes cast in the primary, and

Vasquez lost by 159 votes: 2,073 to 1,914. *Id.* at 8. In the 2014 Democratic primary in HD90, Dr. Engstrom found Latino support for Romero was 78.2%, while African-American support was 12.6% (and other voters 24.3%). TF-19 at 11, Table 4. There were 5,078 votes cast in the primary, and Romero won with 51.08% (2,594 votes). This race did not show cohesion between Latinos and African Americans. Tr433-34 (Chervenak). HD90 overlaps significantly with Plaintiffs' proposed CD33 in Tarrant County.

Defendants note that Hispanic and African-American voters did not support the same candidate in the 2012, 2014, or 2016 Democratic primaries in CD33. Tr1368-71 (Alford). Current CD33 areas would be included in Plaintiffs' proposed coalition districts. In the 2012 primary, CD33 was an open seat, and African-American Marc Veasey and Hispanic Domingo Garcia both sought the nomination. It appears undisputed that both were viable candidates. CD33 spans Dallas and Tarrant Counties; Veasey was from Fort Worth/Tarrant County, and Garcia was from Dallas. TrA1401 (Murray). Alford estimated that 77.9% of Hispanic voters supported Garcia, while 85% of African-American voters supported Veasey, "exhibiting fairly cohesive support for opposite candidates." Tr1367-68 (Alford); D-424 at 17; DX-883. Dr. Murray felt that both race and the county "home factor" affected voting in the runoff because each candidate won his home county, and Veasey did not receive much black support in Dallas County. TrA1401 ("There wasn't much turnout, and he didn't win it by much; whereas, he did very, very well in his home county of Tarrant. So there's this home factor. But, unquestionably, in this primary

there's a good deal of voting for somebody that looks like you or has the same last name or your ethnic or racial group"). Korbel thought the district would have a high probability of electing a Hispanic but did not anticipate the home-county rivalry. Tr830-31.

However, despite the split in the primary, Murray noted that Black and Hispanic voters coalesced around Veasey in the general election, including those heavily Hispanic precincts that voted for Garcia in the primary. He compared the top four performing heavily Hispanic precincts for Garcia in the primary in Dallas County to see if they supported Veasey in the general election, and found that they did—the average support for Garcia in the primary was 91.3% but these same precincts had an average support for Veasey in the general election of 81%. NAACP-64 (Murray Feb. 28, 2014 Supplemental Report on Plan C235) at 20.

In the 2014 Democratic primary, Veasey (now the incumbent) received over 90% of the Black vote, while Hispanics split their vote almost evenly between Veasey and Sanchez. Tr1369-71 (Alford); DX-883. Thus, although half of Hispanic voters now supported Veasey, half did not.

And in the 2016 Democratic primary, Veasey again received over 90% support from Black voters, but his Hispanic support fell (from 49.6% in 2014 to 32.9% in 2016), and 67% of Hispanic voters supported Carlos Quintanilla. Tr1370-71; DX-883. Alford noted that, even after a considerable period of time in which we have an incumbent who's had a chance to effectively represent everyone in the district, Hispanic voters still would prefer

that there be an Hispanic representative in that district. Tr1370-71.

Dr. Lichtman performed an ecological regression analysis of the percentage of Anglos, African Americans, and Latinos among voters participating in the Democratic primaries for CD33. Tr956-58; Quesada-1 (Lichtman report) at 50 (Table 2). In the 2012 primary, 2.4% of Latino VAP turned out, making them 36% of voters in the primary; 14.8% of African American VAP turned out, making them 64% of voters, and Anglos were 0% of voters. In the 2012 runoff, 3.4% of Latino VAP turned out, making them 47% of voters, and 13% of African American VAP turned out, making them 53% of voters. In the 2014 primary, 2.3% of Latino VAP turned out, making them 35% of voters, and 15% of African American VAP turned out, making them 65% of voters. In the 2016 primary, 4.4% of Latino VAP turned out, making them 39% of voters, and 20.5% of African American VAP turned out, making them 53% of voters (Anglos were 8% of voters). This demonstrates how low primary turnout is overall, and especially for Latinos, whose highest turnout percentage was 4.4% of voting age population. It also confirms that African-American voters dominate the primary based on their relative turnout. Tr957-58.

All experts agree that both Latino and African-American voters strongly supported Veasey in the general election. Lichtman found 99% African-American support and 95% Latino support in 2012 and 100% African-American support and 98% Latino support in 2016. Tr959 ("[G]iven those degrees of cohesion, this is pretty safely a district where African Americans and Hispanics in the general election can elect candidates of

their choice. And as I said, this is when you really get the verdict of voters, not in those low turnout primaries."); Lichtman Report at 52 (Table 4).

Lichtman's analysis showed that 55.7% of African-American VAP turned out in the 2012 general election, making them 41% of the voters, 10.8% of the Latino VAP turned out, making them 27% of the voters, and 41.2% of the Anglo VAP turned out, making them 32% of the voters. Lichtman Report at 53 (Table 5). In 2016, 45.6% of the African-American VAP turned out, making them 31% of the voters, 14% of the Latino VAP turned out, making them 33% of the voters, and 49.6% of the Anglo VAP turned out, making them 35% of the voters. *Id.* Lichtman noted that this demonstrates that turnout in general elections is vastly higher than turnout in primaries, and that combined African Americans and Latinos comprise a majority of the electorate. Tr959. Dr. Alford felt that "partisan voting reunited Black and Hispanics in voting for the Democratic candidate" in the general election; he found that the evidence "does not support the assertion that there is a cohesive, geographically compact coalition that can be treated as a single group." D-424 at 18-19.[61]

Based on an analysis of primary elections in CD33, Alford's opinion is that black and Hispanic voters in the district are not cohesive in their choice of minority candidates in the primary in the district. Tr1371. He notes that this is why some Plaintiffs' experts characterize the current CD33 as a black opportunity district and not a

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[61] Dr. Alford also concluded that Anglo voters were not cohesive or at least "not polarized in a way that would enable the Anglo vote to block the nomination of a Black- or Hispanic-preferred candidate." D-424 at 18.

coalition district. Tr1371-72.[62] He further notes this is why the *Gingles* proposals do not truly propose minority coalition opportunity districts, but either African-American or Hispanic opportunity districts. Plaintiffs' *Gingles* proposals, in one form or another, shift decidedly in the direction of increasing the black CVAP proportion of CD33, not seeking to make the district work as a combined majority district, but seeking to make the district more securely a black opportunity district. Tr1374.[63] Similarly, the new coalition district placed between CD30 and CD33 is proposed to perform for Latinos, helping to cure the Latino representation gap in DFW. Although Alford agrees that black and Hispanic voters come together in the general election because of partisanship, he feels that whether they can get a representative of choice from their ethnic group is of critical value. Tr1382-83.

Dr. Alford admitted that in CD33, the general election turnout ranged from 28.2% in 2014 to 53.6% in 2016, while the Democratic primary turnout ranged from 1.3% in 2014 to 8.6% in 2016. Tr1454. He further admitted that the number of Hispanics who chose to vote for Veasey in the general election far surpassed the number that even turned out for the primary. Tr1460. For those Hispanic

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[62] Dr. Lichtman not only stated that CD33 is an African-American opportunity district, he stated that Hispanics are "shut out" in CD33 due to high African-American primary turnout. Tr955, Tr963.

[63] Alford feels that many of the proposed coalition districts will turn out to be African-American districts, thus giving more representation to a group that is not significantly under-represented, while not fixing the underlying problem of Hispanic under-representation. Tr1380-81.

voters who did not vote in the primary, Quesada Plaintiffs contend that Veasey was their first and only choice, such that he was the first choice of 65.6% of Hispanic voters and the second choice of 17.9% of Hispanic voters, and not the choice of 16.4% of Hispanic voters. Docket no. 1527 at 47. Dr. Alford admits that he reaches his conclusion concerning the lack of cohesion solely on the primary elections and not general elections. Tr1448.

In addition to primaries, Defendants cite to lay witness testimony indicating a lack of cohesion, including specifically: (1) the testimony of Tarrant County commissioner Roy Brooks, who stated that in the CD33 primary and other elections, Black and Hispanic voters have supported different candidates, Tr1237[64]; (2) Franklin Moss's testimony that in Democratic primary elections in Tarrant County, Black and Hispanic voters are less likely to vote for the same candidates, Tr1307[65]; (3) Alex Jimenez's testimony that in Tarrant County,

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[64] Brooks agreed that, in his experience in Tarrant County, sometimes African-American and Hispanic voters prefer different candidates in Democratic primary elections, such as in CD33 in 2012. Tr1237. The majority of African-American voters in Tarrant County supported Veasey and the majority of Hispanic voters in Tarrant County supported Garcia in the runoff. Tr1237. In general elections in Tarrant County, African-American voters and Hispanic voters coalesce to vote for the same candidate; they both tend to be Democrats. Tr1239 (Brooks).

[65] Moss had "been informed" that Latino and African-American voters do not always support the same candidates and agreed that would be more likely to occur in Democratic primaries. Tr1307. He also agreed that, in Tarrant County, all things being equal, African-American voters would prefer to have an African American represent them. Tr1307.

Black voters would rather support Anglo candidates than Hispanic candidates, Tr359[66] ; (4) Rep. Anchia's testimony concerning tension between black and Hispanic school board members on the Dallas School Board, Tr136; (5) Elizabeth Alvarez Bingham's deposition testimony that minority groups do not vote cohesively in Dallas County (docket no. 1460-6 at 77-78[67]). Docket no. 1526 at 83-84.

Plaintiffs, on the other hand, offered testimony from lay witnesses to show cohesion. Franklin Moss is an African-American NAACP member who has been a Fort Worth resident for 72 years. He testified that he endorses Latino candidates, and he cited a recent Fort Worth City council election for District 2 as an example where African-American and Latino residents of Tarrant County worked together to elect a Latino candidate they both support. He testified that "a group of persons inside of the loop, 820," which is an area that is predominantly black and Hispanic, worked together to ensure that they elected a city council representative from District 2, and they have been successful in electing a Latino representative. Tr1297-98.

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[66] "Q. In your experience in Tarrant County do you believe that African Americans would rather support Anglos than a Hispanic candidate? A. Yes."

[67] "Hispanics in Dallas County do not all vote the same even within political parties. African-Americans as well. Even within political parties, there is a generational gap in the democratic party between older Hispanics and African-Americans and younger Hispanics and African-Americans. And within the democratic party there is a large disconnect and substantial infighting, cross-party accusations and claims of racism between the Hispanics and African-Americans in a democratic party as against each other."

Rep. Toni Rose (HD110) from Dallas County testified that the Latino community came out in protest and support for a recent African-American police shooting victim. Tr1310. She also testified that the issues that face the African-American community and the Latino community are melded together; they both have issues with and are affected by access to health care, issues with poverty, issues with immigration, racial profiling. Tr1311. Rose stated that, in Dallas County, after the passage of SB4 (the sanctuary cities bill), the Latino community and the African-American communities came together to support the Latinos' efforts to have the City of Dallas join in the lawsuit in opposition to the bill. Tr1315-16. Rose testified that there is a political coalition between African Americans and Latinos in Dallas County, and that quite a few Latino judicial candidates who ran in county-wide races would not succeed without the coalition and African-American support.[68] Similarly, she felt that African-American county-wide officials would have the same difficulty without Latino support. Tr1311-12.

Rep. Johnson, an African American, long-time resident of Dallas County, and representative of HD100, testified that "when there are races that are conducted in districts where you have African-Americans and Latinos living together, which is a lot of my district and, frankly,

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[68] Rose was aware that some had run in contested primaries, including Hector Garcia and Maricela Moore. She was not aware of Garcia's primary opponent, but she testified that Moore's opponent was Monica Purdy. Tr1321-22. She testified that Hispanics and African Americans voted for Moore, and assumed that because Moore won, she received a large amount of African American support, but she did not have specific knowledge of the voting patterns. Tr1322.

most of the southern portion of Dallas before you get to the southern Dallas suburbs," then "voters of color" would coalesce around the same candidates. Tr518-19. He also testified that he receives Latino support in his elections and that they have never talked of running a candidate against him, because he is responsive to their interests. Tr519-20. He testified that Dallas County Sheriff Lupe Valdez "gets a lot of support across communities" and that she would not continually win without support from Latinos and African Americans. Tr520. He further testified that his mother "loves" Rep. Anchia and "we have all kinds of crossover appeal like that in our districts because we've lived together for so long, those two communities." Tr520-21.

Rep. Anchia testified that MALC's proposed CD6 located in Irving and Grand Prairie roughly mirrored the county commissioner district in Dallas County represented by Elba Garcia, that Korbel's analysis indicated it would perform for the Democrat in general elections, and that it was likely that a Latino would win. Tr713-17. However, Rep. Anchia specifically stated at trial that he was not providing testimony on African-American and Latino cohesion. Tr719-20. Nevertheless, in his deposition, he testified that he had seen examples of Latinos and African Americans being cohesive in Dallas, and that he believes they are cohesive more often than not. Anchia depo. at 117, 163. And former Plaintiff Juanita Wallace, a long-time Dallas resident, offered testimony that Black and Latino voters work together to elect candidates, noting specifically Elba Garcia, who got significant support from Black voters, though she had not

specifically reviewed election data for the race. TrJ568-59, TrJ582.

Raul Magdaleno testified that there is a coalition in Dallas between Latinos and African Americans, and that they tend to vote together based on issues important to them that they have in common, such as education, health care, and economic disparities. TrJ1134.

Both lay witness testimony concerning cooperation between the minority groups and statistical evidence can be used to prove cohesion. *See Brewer v. Ham*, 876 F.2d 448, 453-54 (5th Cir. 1989). Statistical evidence is not a legal requirement or the "sine qua non to establishing cohesion," but Plaintiffs "must still satisfy their burden of proof." *Id.* at 454. Lay witnesses testified generally about black and Hispanic coalitions and shared political identity stemming from shared community concerns. Certainly it is undisputed that black and Hispanic voters choose primarily to vote in the Democratic primary, and that they vote cohesively for the Democratic candidate who emerges from the general election, regardless of the candidate's race, and regardless of whether they supported them in the primary.

Lay witness testimony concerning primary cohesion was mixed. And the statistical analyses of Democratic primaries in Dallas and Tarrant Counties consistently demonstrates that black and Latino voters are not cohesive. It seems undisputed that, all things being equal, each group would prefer a candidate that looks like them. *E.g.* Tr1307 (Moss) ("And in Tarrant County, all things being equal, you would agree with me that African American voters would prefer to have an African American represent them, right? A. Yes."). That is why

Dr. Murray and the African-American Congresspersons have testified that, when there are roughly equal numbers of black and Latino population in a district, they will develop "tension" as each group vies to elect candidates of their own in the primaries. While it was explained that this was more likely when the groups were not consulted in drawing the districts or when representation for one or both groups was proportionately low, it indicates that these groups cannot functionally be treated as one in terms of voting behavior. And whether minority groups have the opportunity to elect candidates of their choice is the operative inquiry for *Gingles*. Primaries inform the analysis of whether each minority group in the coalition has the opportunity to elect candidates of their choice, or whether, as Dr. Alford put it, one group is acting as "filler." Most Plaintiffs' experts agree that, in CD33, Latino voters are not able to elect their candidate of choice.[69]

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[69] It is especially interesting that Latinos are not having success in CD33, given the expectation when it was drawn that it would perform for Latinos in light of its proportionately higher HCVAP. Contrasting the situation to that in CD24 in Dallas County considered in *LULAC v. Perry*, it cannot be said that Hispanic voters are simply allowing African-American voters to vote for their candidate of choice in the primary, because unlike CD24, where there was no contested primary, Hispanics have sponsored a candidate in the CD33 primaries. Although it need not decide the issue, the Court does not necessarily agree that Latinos lack opportunity in CD33. In *LULAC*, the Supreme Court noted that "[t]he opportunity 'to elect representatives of their choice,' 42 U.S.C. § 1973(b), requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice." 548 U.S. at 445. The African-American voters in CD24 could only ever influence the outcome of the primary given their low HCVAP% and lack of cohesion

Also troubling is the fact that African-American voters do not act cohesively in support of Latino candidates against Anglo candidates. While the probative value of the HD90 primaries is diminished by the fact that only approximately 5,000 voters or fewer are involved and the Anglo candidate was a long-time incumbent favored by the black community, Dr. Engstrom's primary analyses of statewide elections in Tarrant and Dallas Counties demonstrate that African Americans are even less likely to support Latino candidates than are Anglo voters. The consistent lack of cohesion severely undermines Plaintiffs' claims, as does their assertion that their new proposed coalition districts would perform for one group or the other, and not both cohesively.

Considering all of the lay witness and statistical evidence as a whole, the Court finds that Plaintiffs have failed to establish the necessary minority cohesion to satisfy *Gingles* 2. Accordingly, the *Gingles* results claims must fail.

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with Latinos (as found by the district court). In this case, black and Latino voters together can control the outcome of primaries in CD33, based on their numbers, if they vote together, and could thus demonstrate the opportunity required by *Gingles*. But they have not voted together in the primaries, and black voters have controlled the primaries based on relative turnout. But there are 142,637 citizen voting age Hispanics (327,150 multiplied by .436) and only 78,516 citizen voting age African Americans (327,150 multiplied by .24) in CD33, meaning that Hispanic voters should easily be able to defeat African-American voters if they increase their relative turnout. Regardless, unless they vote cohesively in the primaries, it is not a minority coalition opportunity district.

B. Intentional Discrimination/Vote Dilution Claims

As noted, several Plaintiffs contend that the configuration of DFW and the addition of CD33 in DFW did not remedy the cracking and packing and intentional discrimination found by this Court concerning Plan C185. As discussed above, Plaintiffs complained generally that in Plan C185, minority communities in DFW were cracked (primarily within urban areas where fingers reached in from Anglo-dominated suburban districts). They also complained that CD30 was packed with minorities. This Court addressed those claims in Plan C235 by removing the fingers from minority areas, and what was left was CD33. The Court noted that CD33 was "appropriate to remedy the alleged race-based discrimination that occurred" but "goes no further than required under *Perry v. Perez*." Docket no. 691 at 38. When this Court later analyzed the entire record, it found that Downton had intentionally drawn and cracked a proposed minority district. CD33 looks significantly like the proposed minority coalition district that this Court found was drawn and then intentionally cracked. Thus, CD33 in Plan C235 is an appropriate remedy for that cracking, without going further.

The Court also addressed Plaintiffs' claims that CD30 was packed in Plan C235 by reducing the combined minority population to near benchmark levels.[70] When this

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[70] This Court noted that the combined H+BVAP was increased from 76.7% in the benchmark to 81.5% in Plan C185, but reduced to 75.9% in Plan C235. Docket no. 691 at 37 n.83. The D.C. Court also noted that CD30 was packed insofar as the combined minority voting age population was increased from the benchmark district by 4.8%.

Court later analyzed the entire record, it found that Downton had moved Anglo voters out of CD30 and minority voters into CD30, increasing the minority population above benchmark levels. Because Plan C235 returned these population levels to slightly below benchmark levels, it appropriately remedied that packing.

Plaintiffs complain that Plan C235 does not remedy all of the cracking because minority communities in other portions of DFW remain divided, and they contend that it does not remedy all of the packing in CD30 because CD30 needs far fewer minority votes to continue functioning as an African-American ability district, and those excess minority votes are thus being wasted. They contend that, together, the remaining cracking and packing prevents the creation of additional minority opportunity districts. The Court has already found, however, that Plaintiffs failed to demonstrate that additional minority opportunity districts with cohesive minority communities could be drawn. In addition, the fact that CD30 has a higher-than-necessary minority population is not itself unlawful packing. That higher-than-necessary minority population was in CD30 in the benchmark, thus Downton did not put those voters into CD30 with a discriminatory purpose when he drew Plan C185. And while Plaintiffs contend that those voters could be placed into other districts to create additional opportunity districts, the failure of their *Gingles* claims shows that removing these voters would not create additional single-minority or minority coalition districts. Thus, the Court finds that

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Texas v. United States, 887 F. Supp. 2d at 222 (fact finding 120). This packing was remedied by Plan C235.

Plan C235 adequately remedies the cracking and packing found by this Court.

Last, the Quesada Plaintiffs further indicate that this Court should fix the cracking of southeast Arlington/Grand Prairie found by the D.C. Court because it remains in Plan C235. Quesada Plaintiffs note that, in the section of its fact findings and conclusions of law entitled "Discriminatory Purpose in the Congressional Plan," the D.C. Court included the following finding:

> 112. CD 33 is one of the State's newly apportioned congressional districts. In the Congressional Plan, this district includes all of Parker County and parts of Wise County, both of which are predominantly comprised of Anglo, suburban areas. Anglos make up 85.3% of the population in Parker County and the portion of Wise County included in CD 33 is 78.7% Anglo. Pl.'s Ex. 12. In addition to those Anglo areas, CD 33 cuts into Tarrant County to include Tarrant County's fast-growing minority populations. Representative Veasey testified that enacted CD 33 "goes around southwest—underneath southeast Ft. Worth in the unincorporated Tarrant County, and then moves into Arlington, into the heavily Anglo part of Arlington, and then picks up the fast minority growth area in southeast Tarrant County, Arlington—southeast Arlington–Grand Prairie area." Trial Tr. 23, Jan. 18, 2012 PM (Rep. Veasey).

887 F. Supp. 2d at 220. The D.C. Court did not find that this particular cracking was unlawful, however. In an area with many minority communities, it is inevitable that

some minority communities will remain cracked, and they cannot all be placed into a minority opportunity district. Because cracking this community has not been shown to intentionally or in effect prevent the creation of an additional opportunity district or to minimize minority influence, uncracking is not required.

As a result, the Court finds that Plaintiffs' intentional discrimination/vote dilution claims as to Dallas County fail as to Plan C235. No additional remedies are required in the DFW area.

IV. Houston area

Plaintiffs asserted § 2 results and statutory and constitutional discrimination claims in the Houston area with regard to Plan C185. With regard to the § 2 results claims, the Court found that Plaintiffs had failed to establish the first *Gingles* precondition for their proposed districts , but this did not preclude Plaintiffs from pursuing these claims with regard to Plan C235 with population data reflecting the minority population in 2013, when Plan C235 was adopted. Docket no. 1390 at 146-158. The Court did not find sufficient evidence of racial gerrymandering or racially discriminatory motive. *Id.* at 158-163. Though there was some circumstantial evidence consistent with racial discrimination, the Court ultimately found that Plaintiffs failed to sufficiently distinguish the role of race and politics in the drawing of district lines in Houston. *Id.* at 162.

The NAACP Plaintiffs and MALC bring § 2 results claims in the Houston area with regard to Plan C235. Docket no. 897 (MALC) ¶¶ 60-61. MALC proposes new

coalition districts in Plan C285, and NAACP joins in MALC's plan.

Dr. Murray testified in 2011 that there is Latino growth outside of CD9 and CD18 in Houston, which would have an impact on the ability to draw a new Latino opportunity district because "there's a lot of raw material to work with." Tr1283. He testified that there was growth in the southeastern part of the county, some in the present CD29, but there was also a lot of growth in CD22 and CD36. He also testified that districts 2 and 7 contain substantial areas of heavily Latino voter concentrations. Tr1283-84. He felt that a functional Latino opportunity district could be added, though he had not seen a plan creating a new HCVAP-majority district. Tr1273-74.

In Plan C235, CD29 is an HCVAP-majority (61.6%) district that consistently elects an Anglo Democrat, and CD9 and CD18 are near majority-BCVAP (48.5% and 47%, respectively) districts that consistently elect African-American Democrats. MALC offers the only demonstration plan for the Houston area in this phase, Plan C285, which proposes two additional minority opportunity districts—it maintains the existing African-American districts as ability districts, creates a new HCVAP-majority district, reworking CD29 into a coalition district, and creates an additional coalition district. JX-104. Expert George Korbel drew Plan C285, and he testified that he tried to simplify the existing minority districts while creating two additional minority opportunity districts. Tr736.

He created new HCVAP-majority (50.7%) district CD36 that he characterized as a "ship channel district" that includes Galena Park and Pasadena, South Houston,

Baytown, and Channelview. Tr736-37. CD34 is a new B+HCVAP coalition district (53.3%) dominated by Acres Homes, Studemont, and Oak Forest and the areas in the Spring Branch Independent School District that are north of I-10. Tr736-37. CD18 is the "traditional black district" that was "simplified" and includes Third Ward, Fifth Ward, Montrose, Kashmere Gardens, and black neighborhoods all throughout the center part of Houston. Tr737. Both its BCVAP and HCVAP are reduced from Plan C235 and it becomes 40.2% BCVAP and 18.2% HCVAP. JX-104.3. CD29 includes Aldine and parts of Spring Branch and Sharpstown and Gulfton. Tr737. It is no longer majority-HCVAP but is a 37.6% HCVAP + 16.5% BCVAP coalition district. JX-104.3; Tr738, Tr742. CD9 was then modified "slightly" to fit in with the other districts as a south Harris County district with virtually all the neighborhoods that were in CD9. Tr737-38. Both its BCVAP and HCVAP are reduced from Plan C235 to 41.4% BCVAP and 18.4% HCVAP.

Korbel testified that he tried to put these districts entirely within the urban areas, and in doing that, created five minority districts; all of the districts consistently functioned over the test period for Democrats in the exogenous elections. Tr738; Tr742 (new CD34 and CD36 perform consistently for minority voters); MALC-25.

As with DFW, the minority population (this time also significantly more Asians) grew in the Houston area, and Anglo population declined. But as in DFW, no party has proposed additional single-minority-majority-CVAP districts in the Houston area. Although Plan C285 does create a new HCVAP-majority district, CD29 loses its HCVAP-majority status. Thus, as in DFW, Plaintiffs

must rely on proposed coalition districts to meet the first *Gingles* precondition. Defendants contend that Plaintiffs have failed to prove cohesion in the Democratic primaries, and thus cannot meet their burden under the second *Gingles* precondition.

In 2011, several witnesses testified generally about a "Black and Brown coalition" in Houston. *E.g.*, docket no. 1340 at 373 n.52. Congressman Green testified that African-American and Latino communities within his district had worked together to elect Sheriff Adrian Garcia, the first Latino sheriff. Docket no. 1340 ¶ 564. Rep. Senfronia Thompson, an African American, testified that African Americans, Latinos, and Asians work in cooperation together politically. Docket no. 1364 ¶ 503. She testified that she receives Latino support and that she has supported many Latinos. *Id.*

It is generally undisputed that, here, as elsewhere, African Americans and Latinos choose primarily to participate in the Democratic primaries. In Harris County, Dr. Lichtman found that 86.76% of Hispanic and 97.87% of Black voters participated in the 2008 Democratic primaries, and 53.46% of Hispanic and 94.12% of Black voters participated in the 2010 Democratic primary. Joint Expert Ex. E-3 at 5; *see also* docket no. 1364 ¶ 502 (noting that Murray found "almost zero black population voting in the Republican primaries and very, very little Hispanic population"). It also undisputed that African-American and Latino voters coalesce around the Democratic candidate in the general election, as shown through both lay witness and statistical evidence.

But Dr. Murray and the African-American Congressperson Intervenors were concerned about the C185 configuration in Houston's African-American districts creating "tension," where African Americans and Latinos would compete for control over districts as Latino population increased in the African-American districts. Docket no. 1340 ¶ 566. Dr. Murray testified that such tension is more likely when representatives are not consulted in the drawing of the districts. Tr1284-85. Congressman Green testified that, when one group has a plurality, the two groups can work well together through a "gentle person's agreement" to back candidates from the plurality, but when there is no plurality, tension may develop because both groups want representation. Docket no. 1340 ¶ 567.

Murray agreed that, if Hispanic and African-American populations were balanced about evenly in a district, "you are going to get some tension in Democratic primaries." *Id.* ¶ 566 n.52. He agreed that, in the primary, African Americans tend to vote for African Americans and Hispanics for Hispanics. *Id.*

Dr. Alford notes that in proposed CD34 in Plan C285, the combined BCVAP is at 25% and HCVAP is at 28.6%, and MALC has not offered primary analysis for this proposed district. He testified,

> If we had no other information, we might assume that it reflected a kind of perfect combined minority district because the population numbers suggest that it's pretty evenly divided between the two groups. If they're politically cohesive, that might be just the right way to draw that district.

> We know from the Harris County primary analysis, Dr. Engstrom, that the two groups are not politically cohesive, and we know from the experience in CD33 how that typically would play out. So this is a district that's . . . if it was implemented, likely to be characterized a few years from now as black opportunity district.

Tr1378.

As noted by Dr. Alford, Dr. Engstrom's statistical analysis indicates a lack of Democratic primary cohesion between African-American and Latino voters, with African Americans sharing support for the Latino candidate with Latinos for only two of six candidates in Harris County between 2006 and 2010. Docket no. 307-1 at 16. In several primaries, African-American support for the Latino candidate was lower than "others." Docket no. 307-1 at 17-18. Dr. Engstrom's results are set forth in the following table:

Harris County

	African American voters	Latino voters	Other voters
2006 Dem. Primary Lt. Gov. (Alvarado)	28.0 24.9 - 31.0	39.5 36.1 - 42.7	38.3 36.5 - 40.2
2006 Dem. Primary Lt. Gov. Runoff (Alvarado)	34.8 31.8 - 37.6	43.5 39.0 - 47.9	43.4 40.6 - 46.3

2008 Dem. Primary US Senate (Noriega)	44.1 42.6 - 45.6	73.8 71.2 - 76.4	54.0 52.8 - 55.2
2008 Dem. Primary Sup. Ct. Pl. 7 (Cruz)	27.6 26.3 - 28.8	75.8 73.6 - 78.0	30.6 29.5 - 31.7
2008 Dem. Primary Sup. Ct. Pl. 8 (Yanez)	52.7 51.7 - 53.9	87.8 85.9 - 89.7	44.3 43.1 - 45.4
2010 Dem. Primary Lt. Gov. (Chavez-Thompson)	37.8 36.4 - 39.2	67.6 64.5 - 70.7	31.1 29.6 - 32.6
2010 Dem. Primary Land Comm'r (Uribe)	69.6 68.2 - 70.9	59.0 55.5 - 62.6	46.3 44.7 - 47.9
2014 Dem. Primary Governor (Madrigal)	1.7 0.2 - 2.9	31.8 29.0 - 34.8	.1 0.0 - 0.3

Dr. Chervenak only looked at one primary election in Harris County, the 2016 HD149 Democratic primary, where he measured support from various groups for the

Asian candidate Hubert Vo. He found that all the various groups shared similar levels of support for Vo: African Americans at 56.4%, Latinos at 60.6%, Asians at 62%, and White voters at 55.4%. NAACP-2 at 20. Thus, this does not tell us much about a particular African American and Latino coalition.

While there may not be as much evidence indicating a lack of primary cohesion in Houston as there is in DFW, neither is there much evidence proving primary cohesion Considering all the evidence, Plaintiffs have failed to satisfy the burden of proving minority group cohesion in Houston. The § 2 results claim in the Houston area fails.

V. CD23

Several Plaintiffs challenged the configuration of CD23 in Plan C185, arguing that it was racially gerrymandered by applying the "nudge factor," in which Hispanic population and turnout were manipulated to make CD23 appear to be a Latino opportunity district when in fact it was not. The Task Force also asserted a *Shaw*-type racial gerrymandering claim against CD23.

In the § 5 preclearance litigation, plaintiffs asserted retrogression and discriminatory purpose claims. Plan C235 incorporated changes to CD23 that attempted to address the "not insubstantial" claims that CD23 was impermissibly retrogressed from the benchmark in Plan C185. Docket no. 691 at 31. At the time the Court considered adopting Plan C235, the parties disputed whether CD23 was effectively adjusted to avoid retrogression, with MALC and certain other Plaintiffs arguing that its performance was below benchmark levels

because in almost all elections, the choice of Hispanic voters did slightly more poorly.[71]

Dr. Ansolabahere compared the proposed CD23 in Plan C226 to CD23 in the benchmark in February 2012 as this Court was evaluating the proposed compromise plan. Rod-916 (Analysis of CD23 under Plans C100 and C226). He noted that the HCVAP increased from 59.3 to 60.6%, but that performance for Hispanic-preferred candidates decreased by about one-to-two percentage points in every election he studied, with an average reduction of 1.5%, although the number of wins did not change. Although CD23 was better than in Plan C185, he viewed it as reducing ability to elect from Plan C100.

However, because CD23 in Plan C235 maintained comparable win-loss records on various election indices,[72] the Court concluded that it had been sufficiently restored to benchmark performance levels to avoid retrogression, even if the margin of victory slightly decreased. Docket no. 691 at 31-32. Further, because Plaintiffs argued that CD23 in the benchmark was an opportunity district and its performance on the various indices was similar in Plan

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[71] The Task Force Plaintiffs stated that CD23 as altered in Plan C226 "restore[d] CD 23 as a Latino opportunity district" and noted that the win-loss record of Latino-preferred candidates was similar to the benchmark. Docket no. 638 at 35. The Task Force stated that "[t]he restoration of CD23 in C226 addresses the Latino Task Force claim of intentional discrimination under the Constitution and §§ 2 and 5 of the Voting Rights Act." *Id.* The Task Force did not assert claims against CD23 in Plan C235, and the Court denied the Task Force's motion for leave to amend to pursue such claims shortly before this trial in 2017.

[72] This included the OAG 10, Dr. Handley's index, and Dr. Engstrom's index.

C235, the Court found that Plaintiffs' § 2 claims were resolved, and the Court also did not need to decide the discriminatory purpose claims related to CD23. *Id.* at 32.

In its Order on Plan C185, this Court found that the Task Force Plaintiffs succeeded on their *Shaw*-type racial gerrymandering claim as to CD23, that CD23 was no longer an opportunity district despite its HCVAP-majority status, and that mapdrawers intentionally discriminated against Latino voters and diluted their vote in violation of § 2 of the VRA and the Fourteenth Amendment through the use of the nudge factor. Docket no. 1390 at 11-32.

MALC, the Rodriguez Joint Plaintiffs, and Congressman Cuellar assert claims against CD23 in Plan C235 on the basis that it did not fully remedy the intentional vote dilution and intentional discrimination behind the district lines in Plan C185. The Rodriguez Joint Plaintiffs contend that CD23 continues to run afoul of § 2 despite the adjustments made in Plan C235. Docket no. 1524 at 15. The Court must thus determine whether CD23 as reconfigured in Plan C235 is a Latino opportunity district and whether the harms inflicted in 2011 are remedied.

First, however, the Court considers Defendants' assertion that these Plaintiffs lack standing to challenge CD23.[73] *See* Docket no. 1526 at 74 n.14. MALC has identified "multiple members of its organization who reside in CD 23 or who have districts within the

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[73] Between closing argument and their closing briefs, CD23 is the only area in which Defendants raise a specific challenge to the standing of any Plaintiff.

geographic constraints of CD 23." Docket no. 1532 at 1. MALC notes that it previously identified Rep. King as a resident and voter in CD23 in docket no. 258 and also identified additional MALC members who were residents of CD23. *Id.* at 2. Further, MALC member Poncho Nevarez represents and resides in HD74, which is entirely contained within CD23. MALC-1.

MALC has proven its standing to assert claims against CD23.[74] "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Com'n*, 432 U.S. 333, 343 (1977). First, as noted, at least one MALC member would have standing to sue in his or her own right as a resident of CD23.

Second, the interests sought to be protected—Latino voter strength and representation in Texas's congressional districts—are germane to MALC's purpose. Tr145 (testimony of Rep. Martinez Fischer that MALC looks to develop membership that will take into

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[74] To the extent that other Plaintiffs also assert these claims, the standing of MALC is a sufficient basis for this Court's analysis. *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 501 n.18 (5th Cir. 2004) ("[W]hen one of multiple co-parties raising the same claims and issues properly has standing, we do not need to verify the independent standing of the other co-plaintiffs."); *see also* docket no. 1365 at 116 n.72 ("[T]he Court rests its analysis of the merits on the standing of LULAC, which covers all of the *Larios* claims in the lawsuit.").

account the views of the minority community when it comes to public policy and voting rights). Because MALC is an association of Texas House members, Defendants argue that "the configuration of congressional districts is not germane to the organization's purpose." Docket no. 1526 at 74 n.14. Although the configuration of congressional districts is not *itself* MALC's purpose, that is not what the law requires. The interest to be protected need only be *germane* (*i.e.*, relevant) to MALC's purpose, which is a "low threshold"—"the germaneness requirement is 'undemanding' and requires 'mere pertinence' between the litigation at issue and the organization's purpose." *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 n.2 (5th Cir. 2010) (quoting *Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 148 (2d Cir. 2006)). Here, the configuration of congressional districts overlaps in important ways with MALC's purposes of growing membership and representing Latinos in Texas. MALC's ability to accomplish both of its goals is strengthened by increased Latino political power in congressional districts, even though the strengthening of Latino political power in congressional districts is not itself MALC's purpose. At the very least, MALC's challenges are "pertinent" to the purposes identified by Representative Anchia.

Third and finally, participation of individual MALC members is not necessary and Defendants do not argue otherwise. Accordingly, MALC has standing to assert its claims in CD23, and as a result, the Court finds it

unnecessary to conduct a detailed standing analysis for other Plaintiffs.[75]

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[75] The Fifth Circuit has recognized various Supreme Court decisions that give courts "license to *avoid* complex of questions of standing in cases where the standing of others makes a case justiciable." *Nat'l Rifle Ass'n of Am. v. McGraw*, 719 F.3d 338, 344 n.3 (5th Cir. 2013) (emphasis original) (citing *Massachusetts v. EPA*, 549 U.S. 497, 518, 127 S. Ct. 1438, 167 L.Ed.2d 248 (2007) and *Bowsher v. Synar*, 478 U.S. 714, 721, 106 S. Ct. 3181, 92 L.Ed.2d 583 (1986). The Fifth Circuit has cautioned, however, that "it does not follow that these cases permit a court that *knows* that a party is without standing to nonetheless allow that party to participate in the case." *Id* (emphasis original). The procedural posture of this case and Defendants' standing challenge permits the Court to rest its analysis of multiple plaintiffs' claims on the standing of a single plaintiff. This case has been pending for six years, but after Defendants challenged standing at the motion to dismiss stage, they have not formally re-asserted their challenges by seeking summary judgment or specifically seeking dismissal as to any particular plaintiff on specific grounds. Thus, so long as a single party has standing to assert a particular challenge, the Court will assess the record as to that claim, regardless of whether other plaintiffs have standing to assert the same claim.

However, the Court notes that, even if MALC lacked standing here, LULAC also has a strong case for associational standing. This Court has admitted a declaration from LULAC's Texas State Director, Elia Mendoza, who states that LULAC has councils in Maverick and Val Verde Counties (which are in CD23), that each council has an officer and a contact person, and that there are multiple LULAC members who are registered voters in CD23 (though none are identified by name). Docket no. 1365 at 118 (2011 House Plan Opinion); docket no. 1342-1 (Mendoza declaration). In addition, Congressman Cuellar is the elected representative of CD28, which borders CD23 to the southeast, but is not a voter in CD23. However, elected officials may have standing to protect their interests as district representatives, including "the 'ability to protect their continued tenure,'" and restructuring of CD23 could affect Cuellar's

The parties are in agreement that the Hispanic voters in CD23 have a right under § 2 that the State must accommodate, but they disagree on whether CD23 as configured in Plan C235 is a Latino opportunity district. In Dr. Alford's March 2014 Supplemental Report (D-424), he opined that CD23 "is a politically competitive district that nonetheless provides an opportunity for Latinos to elect their candidate of choice." D-424 at 26; *id.* Table 6 (in C100 CD23 was 2 Democrat wins, 4 Republican wins; in C185 it was 0 Democrat wins, 6 Republican wins; in C235 it was back to 2 Democrat wins, 4 Republican wins). He asserts that, throughout its modern history, CD23 has been a highly competitive congressional district, producing victories for Hispanic Republicans during Republican tides, and producing victories for Hispanic Democrats during Democratic tides. He further notes that, if opportunity requires a demonstrated opportunity for Hispanic voters to elect a candidate of choice, then that has been empirically demonstrated for CD23 because in 2012, Pete Gallego defeated incumbent Francsico Canseco with 50.3% of the vote.

Dr. Alford's more recent analysis reflects an endogenous success rate of 33% (1/3 elections) and a success rate of 12% (3/25) on reconstituted statewide elections. D-878 at 16-17, 20; Tr1431 (Alford). Dr. Alford

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district. *LULAC Council No. 4434 v. Clements*, 884 F.2d 185, 188 (5th Cir. 1989) (quoting *Williams v. State Bd. of Elections*, 696 F. Supp. 1563, 1572 (N.D. Ill. 1988)); *LULAC Council No. 4434 v. Clements*, 999 F.2d 831, 844 (5th Cir. 1993). In any event, the Court again reiterates that it need not decide this question of Congressman Cuellar's standing individually because he asserts the same claims as MALC, which has standing for the reasons described above.

agreed that the district will more often than not elect the Anglo-preferred candidate in endogenous elections, favors the Anglo-preferred candidate in 88% of exogenous elections, and is designed to tilt in favor of Anglo-preferred candidates. Tr1389, 1402, 1430-31. But he still believes that CD23 provides the opportunity required by § 2. Plaintiffs contend that CD23 does not perform for Hispanic voters by electing their candidate of choice in a legally significant number of elections.

A majority-minority district must provide "real electoral opportunity" to the minority group in order for the § 2 right to be fulfilled. *See LULAC*, 548 U.S. at 428. "A 'real opportunity' is not a guarantee of success, as the Court is mindful that § 2 does not guarantee electoral success for minority-preferred candidates." *Perez*, 2017 WL 1787454, at *8 (citing *LULAC*, 548 U.S. at 428). CD23 satisfies § 2 if it offers Hispanic voters the real opportunity to elect their candidate of choice. We are in a unique position to evaluate that question with actual election data because of the peculiar posture of this case. Three endogenous elections have taken place in the district under the Plan C235.

When the current configuration of CD23 was adopted, the HCVAP was 61.3%, an increase from 58.5% HCVAP in the 2011 plan. The most recently available ACS five-year survey data (2011-2015) places the HCVAP at 62.1%. The SSVR in CD23 was stable across all three elections for which C235 has been in place: 55.6 , 55.9, and 55.3%, respectively.

From the 2012 to the 2016 election, Hispanic turnout increased from 46% to 48.2% of the turned-out vote, with a dip in the 2014 midterm election to 40.9%. This increase

in Hispanic turnout led to a decrease in the vote gap between Hispanic and non-Hispanic voters from 16,075 in 2012 to 8,506 in 2016. Looked at another way, it reflects a 20.7% increase in the number of Hispanic voters and a 10.7% increase in the number of non-Hispanic voters.

Dr. Ansolabehere analyzed the Democratic vote totals in the areas moved in, moved out, and kept in the CD23 when compared to C185. He concluded that the areas that were brought into the district, while Democratic, contained insufficient votes to overcome the vote totals for Republicans in the areas that were kept in the district. This left Democrats with a vote deficit of approximately 8,000 votes. Rod-955 (Ansolabehere report) at 15. Such analysis has limited value for reviewing CD23's performance because we can look to the actual election results in three endogenous elections, which in this case demonstrate the opportunity Hispanic voters have to elect their candidate of choice in CD23.

The Hispanic candidate of choice—Democrat Pete Gallego in all three elections—was elected in 2012, but was narrowly defeated by African-American Republican Will Hurd in 2014 and 2016. Gallego won in 2012 by a margin of over 9,000 votes. Gallego's margin of defeat in 2014 was about 2,000 votes and his margin of defeat in 2016 was about 3,000 votes. Both Dr. Engstrom's bivariate and Dr. Alford's multivariate ecological inference analyses of CD23 demonstrate that Gallego lost Hispanic vote share from 2012 to 2016. Engstrom's bivariate analysis shows his Hispanic support declining from 86.9 to 82%. Alford's multivariate analysis shows Gallego's Hispanic support declining from 82.6 to 76.2%. Dr. Alford testified that a 4% drop in support among

Hispanics, smaller than either Engstrom or Alford's analyses demonstrate, would result in a more than 3,000 vote decrease for Gallego. Had Gallego retained his support among Hispanic voters, particularly in an election in which Hispanics were also gaining vote share over 2012, Gallego would have defeated Rep. Hurd.[76] The

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[76] Dr. Alford disagreed with Dr. Flores's conclusion that Gallego lost because of increased racial polarization in the district. Tr1400. Dr. Alford noted that Gallego's Anglo support increased from 23.9 in 2012 to 26.85% in 2014, which is not unexpected since he was the incumbent, but Hispanic turnout dropped more dramatically than Anglo turnout in the non-presidential election year. Tr1393-96. Thus, although both Latino and non-Latino support for Gallego increased, the relative proportions in the electorate that are Hispanic and Anglo are different in that midterm, and "it's an electorate that's less helpful to an Hispanic candidate," such that Gallego loses. Tr1397. Alford further noted that, in 2016, Gallego is not the incumbent, and Hurd is. Hurd is getting 74.8% of the Anglo vote; Gallego is down at 22.4%. Gallego is at 76.2% Hispanic support and Hurd at 19.1%. Tr1394. In terms of Hispanic support, Gallego is down from 2014, which Alford did not think was unusual because Gallego was running as a challenger rather than as an incumbent and Hurd, the incumbent, has had some time to move from being a candidate to being someone who actually represents the district. Tr1394. Although the proportion Hispanic in the turned-out vote went up by a couple of percentage points, Gallego still lost, and that is where Alford felt the EI analysis explained why—Gallego's support among *both* Hispanics and Anglos dropped. Tr1398-1400. Alford felt this was not increased racially polarized voting because Gallego was defeated in 2014 in an election when his level of support increased in both Anglos and Hispanics, and he was defeated again in 2016 when his level of support decreased in both Anglos and Hispanics. Tr1400-01. Thus, Alford indicated, the 2014 defeat was due to a decrease in relative turnout, and the defeat in 2016 was due to a decrease in Hispanic cohesion in support of Gallego (as well as a decrease in Anglo support). *See also* Tr1065 (Ansolabahere) (noting that if there is a small difference in turnout in

competitiveness of these elections is sufficient to find that CD23, as currently configured, is a Hispanic opportunity district.

The exogenous elections over the previous three cycles show less success for the Hispanic candidate of choice in the district. Under the current plan, the Hispanic candidate of choice was successful in three of twenty-five exogenous elections in CD23.[77] The Rodriguez Plaintiffs contend that "an abysmal 12% success rate is far below any of the indices this Court cited in its discussion of benchmark CD23" and, unlike CD23 in Plan C100, the endogenous success rate is also low (33% compared to 66% in Plan C100). Docket no. 1254 at 16. But exogenous elections are far less probative than the actual endogenous election data we have. We have also rejected a pre-set success rate for the minority preferred candidate in exogenous elections. *Perez,* 2017 WL 1787454, at *8. Such a requirement is not compatible with the Supreme Court's directives that § 2 requires a searching, practical inquiry specific to the facts of each case. *Id.* We know that CD23 may still perform for minority-preferred candidates even when its performance on statewide indices is equal to or less than 50%. Although a 33% endogenous success rate is undoubtedly less than the 66% we considered to provide opportunity in CD23 in

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the favor of the Hispanic-preferred candidate, then the district polarization will kind of help cement that as a Hispanic district, but if there is a small deficit in the opposite direction, that will help cement it as a non-Hispanic district).

[77] Korbel's analysis showed that CD23 performed in exogenous elections 0/10 in 2010, 0/5 in 2012, 0/12 in 2014, and 2/8 in 2016. Tr726; Tr743; MALC-25.

Plan C100, as Dr. Alford noted, with only three endogenous elections, one change in win/loss results in a large change in percentage. And the fact that endogenous wins are less than 50% is not dispositive.[78] The evidence indicates that Latinos *can* win elections in the district, and whether they can win in the future is largely within their control.

On the whole, CD23 is a highly competitive district for U.S. Representative candidates. Hispanics have an opportunity to elect a candidate of their choice where merely small changes in cohesion, turnout, candidate quality, or a host of other factors could tip the election in their favor. Section 2 is not meant to be a guarantor of political success and we will not further tinker with the boundaries of CD23 to achieve that end.

Last, the Court considers whether the intentional harms found with regard to Plan C185 continue in Plan C235, despite the changes to the district.[79] In finding that mapdrawers applied the "nudge factor" in CD23 in Plan C185, the Court noted that the Legislature intentionally split Maverick County and the City of Eagle Pass to exclude politically active Hispanics who would not support Canseco, increased the turnout gap between Latinos and Anglos, and increased SSVR while simultaneously decreasing Latino cohesion (and performance) by

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[78] "The circumstance that a group does not win elections does not resolve the issue of vote dilution." *LULAC*, 548 U.S. at 428.

[79] As to the *Shaw* claim, to the extent race predominated in Plan C185, the district was redrawn in Plan C235. Even if race predominated in that redrawing, changes to the district were necessary to address intentional discrimination, and thus any use of race served a compelling state interest.

selectively including high SSVR districts with worse performance for Latino-preferred candidates.[80] The Court found that the increases in SSVR and HCVAP were not intended to and did not maintain or improve Latino voting strength. Docket no. 1390 at 22.

In Plan C235, no changes were made to El Paso or the northern border, but Maverick County was made whole and placed within CD23, and Atascosa County was made whole and placed within CD28. Changes were also made to CD20, CD23, and CD28 in Bexar County. The Task Force, one of the principal Plaintiffs groups pursuing the nudge factor claim in CD23, stated that "[t]he restoration of CD 23 in C226 [which became C235] addresses the Latino Task Force claim of intentional discrimination under the Constitution and §§ 2 and 5 of the Voting Rights Act." Docket no. 638 at 35.

Dr. Ansolabahere looked at the alterations made to CD23 in Plan C235 and the available information at the time to determine how the district was being reconfigured and if the changes "were fixing specific problems" in terms of increasing turnout or SSVR. Tr1060-61. He noted that although HCVAP was increased, the actual number of Spanish surnamed registered voters barely increased. Tr1061; Rod-955 ¶ 27 (the changes resulted in a net increase of only 243 SSVRs). He noted that this was an indication that maybe the areas being moved in were

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[80] As the Court noted, although Downton claimed to be trying to include more Hispanic Republicans, his method could also include precincts with low Hispanic turnout and high Anglo Republican turnout or higher Anglo bloc voting levels, and he failed to consider the Hispanic incumbent's chances in the Republican primary. Docket no. 1390 at 21 n.19.

not going to perform to the level that they needed to in terms of participation. Tr1061. He further found that the areas moved into CD23 had lower turnout than the areas moved out of CD23, and that the movement of lower turnout areas into CD23 did not improve, and may have worsened, the electoral opportunities afforded to Hispanics in the district. Rod-955 ¶¶ 28, 30.

Dr. Ansolabahere acknowledged that Plan C235 fixed the Maverick County split and moved the entire County back into CD23, and that both HCVAP and SSVR were increased. Further, although he notes that areas moved into CD23 had lower turnout than areas moved out, his turnout analysis looked only at total turnout, not Hispanic or SSVR turnout, and did not compare Hispanic and non-Hispanic turnout differences. Tr1153.[81]

Dr. Flores's analysis examined the change in SSVR in Latino opportunity districts from 2008 to 2016, and found that the SSVR decreased slightly in CD23 (-0.2%). TF-20 at 3. But he found that it similarly decreased in CD20 (-0.5%) and CD35 (-0.9%). TF-20 at 2. Flores also found that "Latinos were more successful in increasing their number of votes cast when compared to non-Latino voters" but they "could not overcome the total turnout numbers of non-Latino voters." TF-20 at 7. He also found, based on the difference in turnout rates between Latinos and non-Latinos in the 2012 and 2016 general elections, that "[a]lthough Latinos have made gains closing the turnout

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[81] Dr. Ansolabahere looked at 2010 election turnout because that was the data available to the mapdrawer, but he agreed that Defendants' 2016 election turnout analysis showed an overall increase in turnout. Tr1154-57; DX-808.

gap in 2016 compared to 2012, the participation gap is still substantial at 15.8%." TFX-20 at 7-8.

In his conclusions, Dr. Flores notes that he previously pointed out the "difficulties that Latino candidates of choice would encounter because of the manner in which CD 23 was constructed by the Texas Legislature" in terms of turnout, and that Plan C235 "made some modifications to CD23 in Bexar County as an interim remedy." TF-20 at 12. He then states, "However, since 2012 the challenges facing Latino voters in CD23 have worsened with the increased level of bloc voting by non-Latinos against the Latino candidate of choice." *Id.*[82] But this fails to tie any of the current problems he identifies in CD23 to specific lines drawn in Plan C185. It is not enough to point to problems with CD23 in Plan C185 and problems with CD23 in Plan C235, without connecting the problems in Plan C235 to decisions made in Plan C185 and demonstrating specific continuing harms flowing from Plan C185. While Flores shows that Latinos continue to have a turnout gap compared to Anglo voters, that fact is

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[82] As noted above, non-Latino bloc voting actually decreased between 2012 and 2014. Dr. Engstrom's analyses show that, between 2012 and 2014, both Latino and non-Latino support increased for Gallego. TF-19. In addition, both Anglo support and Latino support for the Hispanic-preferred candidate were higher in 2012 under Plan C235 than they were in 2010 under Plan C100. In 2010, Engstrom found 84.7% Latino and 18.1% non-Latino support for Rodriguez. Docket no. 307-1 at 25. In 2012, he found 86.9% Latino and 20.8% non-Latino support for Gallego. TF-19. Engstrom also estimated Latinos at 40.77% of the turned-out vote in 2010, while Flores found Latinos to be 46% of the turned-out vote in 2012. Docket no. 307-1 at 25-26; Flores Table 4 (92,997 Latino votes cast in 2012); Flores Table 5 (109,072 non-Latino votes cast in 2012).

true in most areas, if not statewide, and there is simply no evidence for the Court to conclude that the turnout gap in Plan C235 is the result of intentional discrimination in the mapdrawing process or carryover from Plan C185. And while the district may not perform as desired for Hispanic-preferred candidates, the Court finds no persuasive evidence that the lack of performance is the result of intentional discrimination in either 2011 or when the interim map was drawn in 2012.

Based on the foregoing, the Court finds that no changes are required to CD23.

VI. CD35 and CD27

The Rodriguez Plaintiffs contended that CD35 in Plan C185 was an impermissible racial gerrymander in violation of the *Shaw*-line of cases. And several Plaintiffs asserted that the removal of Nueces County from the "envelope" of South and West Texas Latino opportunity districts violated § 2 because Nueces County Hispanic votes were deprived of their opportunity to elect candidates of their choice. Hispanic voters in Nueces County who had been in benchmark Latino opportunity district CD27 asserted § 2 and Fourteenth Amendment claims based on the reconfiguration of CD27 in Plan C185, which placed them in an Anglo-majority CD27 oriented toward the north that was unquestionably no longer a Latino opportunity district.

The Court agreed that CD35 was an impermissible racial gerrymander because race predominated in its creation without furthering a compelling state interest. Although a new Latino opportunity district was required in South and West Texas, the Court found that

mapdrawers' placement of significant population from Travis County into CD35 was not to substantially address the § 2 requirement, but to use race as a tool for partisan goals. Travis County does not have Anglo bloc voting and thus does not meet the third *Gingles* precondition, which mapdrawers knew, and placement of CD35 there was not to address § 2 concerns, but to intentionally destroy an existing district with significant minority population (both African American and Hispanic) that consistently elected a Democrat (CD25).[83]

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[83] Relatedly they intended that the CD25 incumbent, Lloyd Doggett, would lose any subsequent election in either CD25, which became a safe Republican district, or in a CD35 primary. Accordingly, they were willing to accommodate requests from Hispanic Democrat legislators from Bexar County to weight the district more heavily toward Bexar County. The result was the least compact district in the plan, designed not for a cohesive Hispanic voting bloc, but to allow Bexar County Hispanics to control elections, hopefully ousting Doggett, an Anglo, if he chose to run in the district. Defendants' plan was not realized, however, since Doggett secured re-election in CD35 despite it being designed to elect a Latino from Bexar County.

Several Plaintiffs also brought intentional discrimination claims based on the alleged intentional destruction of CD25 as a functioning crossover district. Because the *Shaw* equal protection violation would require district lines to be redrawn in Travis County, the Court did not reach that specific claim. Relatedly, Defendants have argued that Plaintiffs cannot establish a § 2 claim in Travis County related to the intentional destruction of alleged crossover district CD25 because the Court found no racially polarized voting in Travis County such that a crossover district would not be required to be drawn there. That argument misunderstands the nature of Plaintiffs' *Bartlett* claim, however. No party has asserted that § 2 requires a crossover district to be created in Travis County. Rather, certain plaintiffs are arguing that the intentional destruction of an existing crossover district, when done with racially discriminatory purpose, violates the Fourteenth

Simultaneously, mapdrawers removed Nueces County and its substantial Hispanic population from the South/West Texas configuration of districts, and placed it in an Anglo-dominated district going northward, not because they wanted these Hispanic voters to have influence in CD27 or because their rights could not be accommodated without other voters' § 2 rights failing to be accommodated, but because they would not vote for the newly elected Anglo Republican incumbent.[84] Placing them in the new Anglo-dominated CD27 would ensure that Anglo bloc voting would prevent them from electing their preferred candidate. Thus, although these Nueces County Hispanic voters had a § 2 right, had been in an opportunity district, and could have remained in one, they were intentionally deprived of their right to elect candidates of their choice.

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and Fifteenth Amendments. While § 2 does not require states to draw crossover districts, a remedy for the purposeful destruction of an existing crossover district could include recreating the destroyed crossover district.

[84] Even Defendants' expert Dr. Alford agreed in the 2011 trial that CD27 was flipped from a Latino opportunity district to an Anglo-majority district to protect a candidate who was not preferred by the Hispanic voters. Tr1829, Tr1832, Tr1837. In *LULAC v. Perry*, 548 U.S. 399, 441 (2006), the Supreme Court noted that "incumbency protection can be a legitimate factor in districting," but "not all of [its forms are] in the interests of the constituents." Thus, "If . . . incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters. . . . This policy, whatever its validity in the realm of politics, cannot justify the effect on Latino voters." *Id.*

In sum, the Court found that the Legislature violated § 2 in both result and intent, as well as the Fourteenth Amendment, by racially gerrymandering CD35 to replace CD25 and simultaneously impermissibly trading the § 2 rights of Nueces County Hispanic voters for those in Travis County, who lacked a § 2 right to a Latino opportunity district. The Court found that seven Latino opportunity districts were required in South and West Texas, and while the Legislature enjoys some discretion in creating such districts and not every voter who demonstrates a § 2 right has a corresponding right to be placed into an opportunity district,[85] the Legislature

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[85] In its Order on Plan C185, this Court stated that, "Where the rights of voters who have demonstrated § 2 violations can be accommodated through the use of compact districts that do not subordinate traditional redistricting principles more than necessary to address the § 2 liability, those voters' § 2 rights must be accommodated." Docket no. 1390 at 56. This was not meant to imply that any voter with a § 2 right must be placed into a § 2 district, or that Nueces County Hispanics would have had a right to be included in a Latino opportunity district under any circumstances. Rather, Plaintiffs demonstrated that seven compact Latino opportunity districts could be drawn and that § 2 required seven such districts, and the Legislature was required to accommodate those rights. If the Legislature had substantially addressed the requirement for seven Latino opportunity districts while still not including Nueces County, and there was no evidence of improper intent, this would be a different case, and Nueces County Hispanics would not have a right to inclusion in a Latino opportunity district. That is why, at the time the Court adopted the interim maps and had not yet found improper intent with regard to CD27 and CD35 and improper racial gerrymandering in CD35, it concluded that Nueces County Hispanics did not have a right to be placed into a Latino opportunity district. However, with the benefit of examination of the full record, that is not the case.

intentionally did not substantially address the § 2 violation.

The exact same configuration of CD35 and CD27 remains in Plan C235. At the time the Court adopted Plan C235 as the interim plan, it did not alter the configuration of CD35 because it did not have the benefit of the full record and did not find that race predominated. In light of all the evidence and a full consideration of the record, the Court found that its preliminary conclusion concerning race predominance was erroneous. In conducting strict scrutiny review, the Court then determined that the placement of CD35 in Travis County was far from benign.

In addition, at the time the Court adopted Plan C235, it stated that the failure to place Nueces County Hispanics in a South Texas district did not diminish Hispanic voter opportunity for § 2 effects purposes, since whether they were included or not, no additional compact Latino opportunity district could be drawn. While this remains true, the Court's opinion on Plan C185 did not base its holdings on the mere failure to include Nueces County Hispanics in a § 2 Latino opportunity district, nor on a § 2 effects claim based on the failure to create additional Latino opportunity districts, the claim to which that statement was directed. Rather, the Court found that the Legislature intentionally diluted the vote of Nueces County Hispanics who would not support incumbent Farenthold, while simultaneously trading their § 2 rights to Travis County voters without a § 2 right.

The fact that seven HCVAP-majority districts were drawn in South and West Texas and that no more could be drawn simply does not resolve the issues. The

Legislature racially gerrymandered to create the seven districts, yet *intentionally* failed to substantially address the § 2 violation that required those seven districts. The same facts exist and the same harms continue. Updated evidence indicates that there still is no Anglo bloc voting in Travis County, yet Travis County population makes up almost 31% of CD35. Tr1167 (Ansolabahere); JX-100.2. Using 2010 Census data, there are 215,626 individuals from Travis County included in CD35, about 140,800 of whom are Hispanics. JX-100.2. Dr. Ansolabahere testified that 220,000 Nueces County Hispanics are stranded in CD27, a district with 44.6% HCVAP. Tr1162-63.[86]

The Rodriguez Plaintiffs maintain their *Shaw*-type claim against CD35, and their intentional discrimination claim related to the destruction of CD25. Docket no. 1524 at 3 & n.8.[87] The Rodriguez Plaintiffs note that the lines of CD35 have not changed, that it remains the least compact district in the state, and that the same population suffers from the State's unjustified race-based classification in Plan C235. Docket no. 1254 at 13. The Rodriguez Plaintiffs also correctly point out that discriminatory intent is not an element of a *Shaw*-type racial gerrymandering claim, and thus the only inquiry remains whether race predominated in the decision to place a significant number of voters within and without the district and, if so, whether strict scrutiny is satisfied. Because the lines of CD35

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[86] Nueces County is now 57.55% HCVAP; there are 218,400 Hispanics in Nueces County, 205,990 Hispanic citizens, and 142,230 HCVAP. Tr1163; D-702.

[87] Other Plaintiffs, including MALC and the NAACP Plaintiffs, also maintain claims related to the intentional destruction of CD25.

remain identical to the lines in CD35, Rodriguez Plaintiffs note that the evidence is largely the same. Docket no. 1254 at 14.

Defendants contend that, although this Court found CD35 to be an unconstitutional racial gerrymander in Plan C185 and CD35 remains unchanged in Plan C235, there is no unconstitutional racial gerrymander in Plan C235 because the Legislature "did not draw the boundaries of any district" and "did not make a 'decision to place a significant number of voters within or without a particular district.'" Docket no. 1526 at 85. As discussed above, this argument lacks merit, as it improperly focuses on the re-enactment of a plan containing CD35, rather than the decision as to which voters to place within and without the district at the time that decision was made (in 2011).

Although Plan C235 was enacted in 2013, the decision as to which voters to include within CD35 was made in 2011, and that remains the proper time for evaluating the district under *Shaw*. Otherwise, a Legislature could always insulate itself from a *Shaw*-type challenge simply by re-enacting its plan and claiming that it made no decisions about who to include in the district at the time of re-enactment. There is no evidence that the Legislature again considered in 2013 which persons to include within CD35 (and Defendants deny that any such decisions were made in 2013), or that it considered any evidence to provide a strong basis in evidence that did not previously exist in 2011. Rather, as the Court found above, it maintained these aspects of Plan C235 in spite of the possibility that such infirmities remained. Thus, this

Court's prior findings and conclusions concerning CD35 remain equally applicable to Plan C235.

With regard to the Nueces County and CD27 claims,[88] the Court found that these Hispanic voters were intentionally deprived of their opportunity to elect a candidate of their choice, which they likely would have done in the next election given that Hispanic turnout is greater in presidential election years, and that their rights were essentially traded to Hispanics in Travis County without a § 2 right. There is no evidence that the Legislature engaged in any meaningful deliberation in 2013 to cleanse away such discriminatory intent, and in fact they intended to maintain any such discrimination, purposefully intending to deprive plaintiffs of any remedy.[89]

Therefore, the Court holds that the Plan C235 configurations of CD35 and Nueces County/CD27 remain violations of § 2 and the Fourteenth Amendment and must be remedied.

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[88] MALC, the Perez Plaintiffs, the Quesada Plaintiffs, LULAC, and the Rodriguez Plaintiffs maintain claims against CD27 in Plan C235 on behalf of Nueces County Hispanic voters. MALC's membership includes Abel Herrero, who represents and lives in HD34 in Nueces County. MALC-1.

[89] Plaintiffs' most recent demonstration plans split Nueces County to accommodate the Legislature's goal of protecting incumbent Farenthold within CD27. All of Nueces County can be placed into a Latino opportunity district, but the county is split to place Farenthold in an Anglo-majority district. To the extent such a split might be objected to as failing to respect county boundaries, that traditional redistricting principle is not being subordinated to race, but to the Legislature's goal of protecting Farenthold.

Plan C235 Summary and Conclusions

In Part II, the Court concludes that the racially discriminatory intent and effects that it previously found in the 2011 plans carry over into the 2013 plans where those district lines remain unchanged. The discriminatory taint was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but be safe from remedy. The Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans.

In Part IIIA, the Court concludes that Plaintiffs' § 2 results claims in the DFW area fail for lack of proof of African-American and Hispanic cohesion. In Part IIIB, the Court finds that the intentional discrimination found in DFW in Plan C185 is remedied in Plan C235, and that Plaintiffs failed to prove that any alleged cracking and packing that remains in DFW was intentionally dilutive.

In Part IV, the Court concludes that Plaintiffs' § 2 results claims in the Houston area fail for lack of proof of African-American and Hispanic cohesion.

In Part V, the Court finds that CD23 is a Latino opportunity district and there is no evidence of intentional discrimination/dilution.

In Part VI, the Court concludes that the Plan C235 configurations of CD35 and Nueces County/CD27 violate § 2 and the Fourteenth Amendment. These statutory and constitutional violations must be remedied by either the Texas Legislature or this Court.

It is therefore ORDERED that the Office of the Attorney General file a written advisory within three

business days stating whether the Legislature intends to take up redistricting in an effort to cure these violations and, if so, when the matter will be considered.

If the Legislature does not intend to take up redistricting, the Court will hold a hearing to consider remedial plans beginning on **September 5, 2017 at 8:30 a.m.** in Courtroom 1. In preparation for the hearing, the parties must take immediate steps to consult with their experts and mapdrawers and prepare statewide congressional plans that remedy the violations found in CD35 and CD27 yet minimize the effect on adjoining districts.

The parties must confer and address objections and concerns, to the extent possible, prior to the hearing. If both sides agree upon a remedial plan, they should notify the Court, but the hearing will nevertheless proceed so the parties can present the plan on the record. If the parties cannot agree, they should be prepared to offer, support, and defend their proposed remedial plan(s) at the hearing. Plaintiffs and Defendants will be permitted to offer up to four alternative remedial plans per side, and Plaintiffs may (but are not required) to jointly offer plan(s). The plaintiffs who asserted and prevailed on their claims against CD35 and Nueces County/CD27 (MALC and the Rodriguez plaintiffs (proceeding jointly with the LULAC and Perez plaintiffs)) should take the lead in drawing and proposing any remedial plans, and the remaining plaintiffs (NAACP, Latino Redistricting Task Force, Congressman Cuellar, and the Quesada plaintiffs) may participate in an advisory role and assert any objections or concerns they may deem appropriate.

The parties should consult with Texas Legislative Council, to the extent necessary, to upload their proposed remedial plans into DistrictViewer and ensure that all relevant data is available to all parties and the Court. If the parties intend to rely on data or analysis that is not available through TLC, they must provide that data to all other parties as soon as that data is available.

It is further ORDERED that Texas Legislative Council staff be present at the remedial hearing for technical assistance in the parties' presentation of their proposed plans through DistrictViewer or other available means.

Because this order only partially addresses the issues herein – the violations in C235 – it is interlocutory. The Court bifurcated the remedial phase, which will commence as scheduled herein. The Court must also address the alleged violations in H358 and, if necessary, a remedial plan for the Texas House.

SIGNED this 15th day of August, 2017.

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
on behalf of the panel

APPENDIX F

In the United States District Court
for the
Western District of Texas

SHANNON PEREZ, ET AL.	§	
	§	
v.	§	SA-11-CV-360
	§	
GREG ABBOTT, ET AL.	§	

ADVISORY

This Court recognizes the effect of the temporary stay entered by the Circuit Justice, but sees nothing in the order that would prohibit the parties from voluntarily exchanging their proposed remedial maps, conferring, and attempting to reach an agreement or understanding on certain aspects of the remedial maps so that in the event the stay is vacated by the Supreme Court this matter may be resumed expeditiously.

SIGNED this 28th day of August, 2017,

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
on behalf of the panel

APPENDIX G

U.S. Constitution Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

52 U.S.C. § 10301

§ 10301. Denial or abridgment of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

APPENDIX H

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 8, 2013

The Honorable Joe Straus
Speaker, Texas House of Representatives
Post Office Box 2910
Austin, TX 78768

Dear Speaker Straus:

When the Supreme Court issues its ruling in *Shelby County v. Holder*, the Texas redistricting case will return to the San Antonio court for further legal proceedings. The best way to avoid further intervention from federal judges in the Texas redistricting plans, and ensure an orderly election without further delay or uncertainty, is to enact the interim maps during the regular session. These maps already have the approval from the federal judges overseeing this litigation. Enacting the interim plans into law would confirm the legislature's intent for a redistricting plan that fully comports with the law, and will insulate the State's redistricting plans from further legal challenge.

Sincerely,

Greg Abbott
Attorney General of Texas

GA:ra

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ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 18, 2013

The Honorable Kel Seliger
Texas Senate
Post Office Box 12068
Austin, Texas 78711

The Honorable Drew Darby
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768

Dear Senator Seliger and Representative Darby:

You recently received a letter from Jose Garza, the Mexican-American Legislative Caucus's redistricting counsel, concerning pending legislative proposals to adopt the 2012 court-ordered interim redistricting plans as the State's permanent redistricting maps. Mr. Garza's letter contains multiple statements and misrepresentations that do not merit a response. But to prevent you from being misled, I will provide you more information about a few of the issues raised by Mr. Garza.

First, Mr. Garza notes that federal judges in Washington, D.C. have ruled that two of the redistricting plans adopted by the Legislature were created "with a discriminatory

purpose." Indeed, they did. In fact, the D.C. court concluded that all three maps were tainted by evidence of discriminatory purpose. That is exactly why you should take action. The Legislature has both the opportunity and the obligation to remove that specter of discrimination. That is why I have been counseling leadership that the best way to remedy the violations found by the D.C. court is to adopt the court-drawn interim plans as the State's permanent redistricting maps.

Evidently Mr. Garza believes that the interim maps crafted by three federal judges are burdened by discriminatory purpose or other violations of the Voting Rights Act. The interim maps were not drawn by or voted on by the Texas Legislature. I don't believe — as Mr. Garza does — that the federal judges ordered the 2012 elections to proceed under maps that incorporated racial discrimination. And indeed, the interim maps remedy every legal violation found by the D.C. court.

Mr. Garza faults my proposed resolution to the protracted and contentious redistricting litigation, calling it an "end-run around the judicial process on redistricting." If he is accusing me of attempting to avoid further litigation, I confess.

Far from being an "end-run around the judicial process," my proposed solution recognizes that the Constitution gives to states the prerogative – and primary responsibility – for redistricting. The Supreme Court has repeatedly emphasized that redistricting is first and primarily a legislative function belonging to the states. *See, e.g., LULAC v Perry*, 548 US 399, 414-15 (2006). The Texas Legislature – not a federal court – should have the ultimate word on the State's redistricting maps. You should reject Mr. Garza's solicitation to abdicate Texas' sovereign responsibility. You should not cede to federal courts a responsibility that is first and foremost yours. At this moment, you have control. After the session, you lose control.

Mr. Garza also states that enacting the interim plans would occur "without meaningful input from the minority community." That is wrong. Mr. Garza ignores the fact that the interim maps were drawn with the input and approval of a significant number of the minority groups challenging the State's redistricting maps – even if he himself held out for more. You should also know that Mr. Garza and MALC participated in the interim map-drawing process by submitting their own proposed interim plans – they were rejected by the federal court.

Moreover, any legislative approval of the interim plans should – and will – be done through the normal legislative process, which will include full public notice and hearing for the very purpose of gaining "meaningful input" from all Texans, including the minority community.

He also suggests that passing the interim maps will inject additional delay and confusion into the election process. To the contrary, the interim maps have already met with the approval of the federal judges overseeing the redistricting litigation and are the very same maps that Texans voted under during the 2012 election cycle. On the other hand, MALC's proposed interim plans, which if made permanent would significantly alter current legislative districts, have already been rejected by the federal judges who crafted the interim plans. If MALC continues to push for overreaching alterations to the maps the only certainty is prolonged litigation.

Contrary to Mr. Garza's suggestion, the surest way to ensure continuous redistricting litigation and inject further delay is for you to do nothing. If you fail to pass the interim maps, it will likely take several years to resolve the current redistricting litigation (and ensuing appeals), ensuring that Texas' elections will for years to come be mired in confusion or delay or both. As I stated in my March 8 letter to House Speaker Joe Straus, the best way to decrease voter confusion and to end unnecessary litigation would be to enact legislation that makes the 2012 interim plans drawn by the San Antonio district court the State's permanent redistricting maps.

Sincerely,

Greg Abbott
Attorney General of Texas

cc: Lieutenant Governor David Dewhurst
Speaker Joe Straus
Senator Rodney Ellis
Senator Sylvia Garcia